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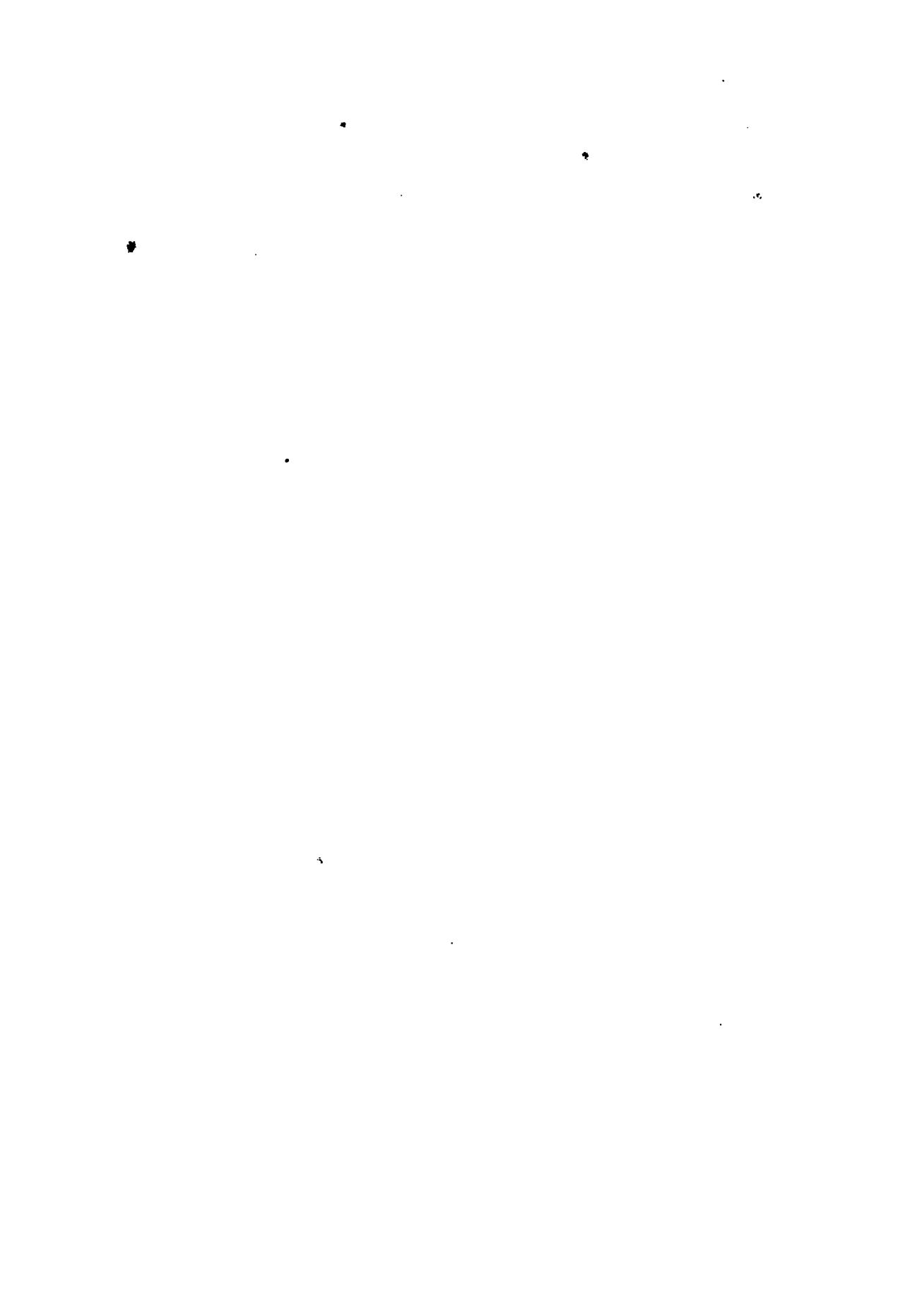


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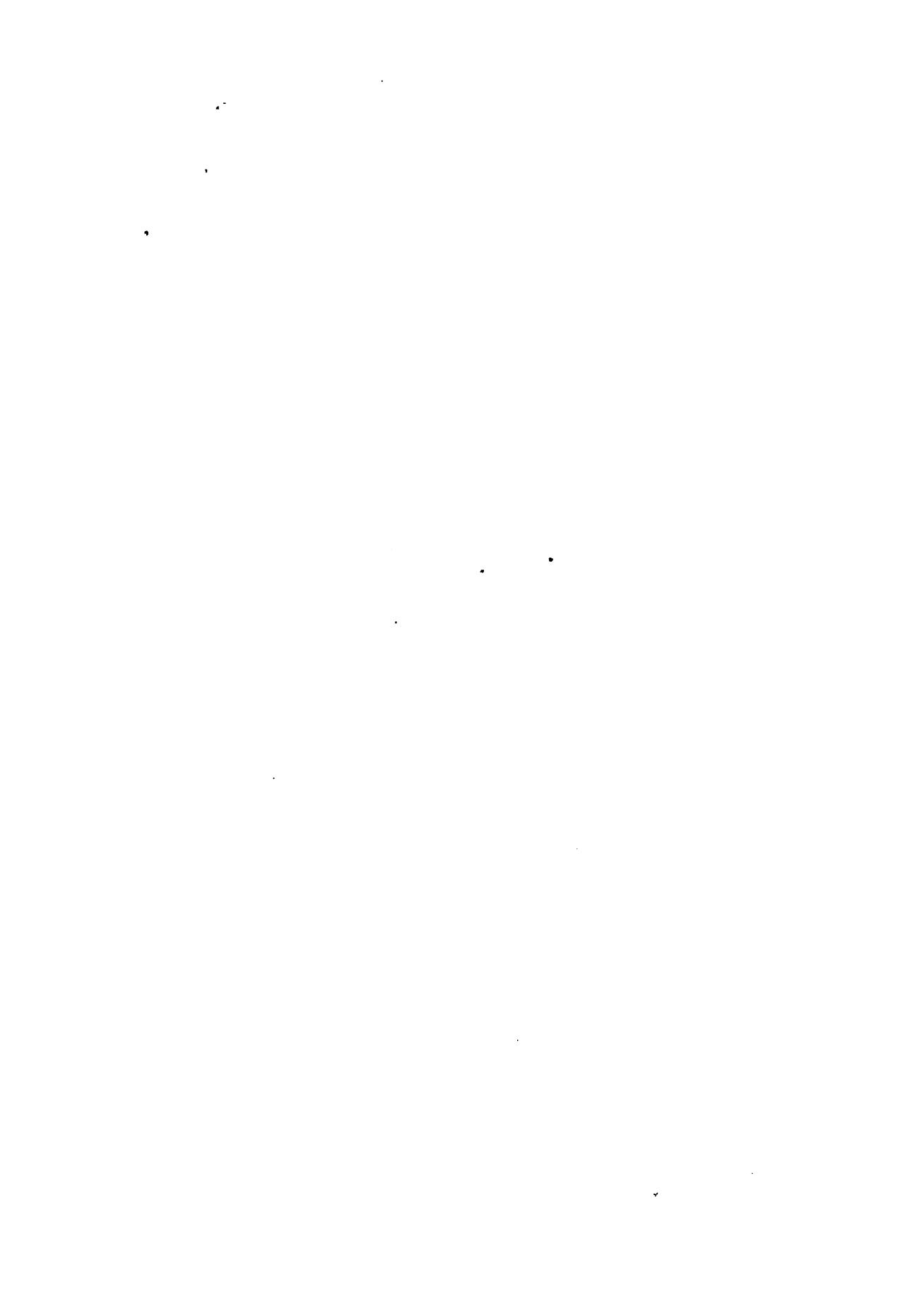












TO

The Commissioners of the Code, in pursuance of the Act of April 6th, 1857, beg leave to submit to you this draft of a PENAL CODE, and to invite your examination of it, and such suggestions as may occur to you.

You will please to consider this volume as private in your hands, and return it to one of the Commissioners on or before the first of May next.

Very respectfully,

DAVID DUDLEY FIELD,  
WILLIAM CURTIS NOYES,  
ALEXANDER W. BRADFORD.

NEW YORK, *April 2, 1864.*



D R A F T

OF A

# PENAL CODE

FOR THE

## STATE OF NEW YORK;

PREPARED BY

THE COMMISSIONERS OF THE CODE,

AND

SUBMITTED TO THE JUDGES AND OTHERS FOR EXAMINATION,  
PRIOR TO REVISION BY THE COMMISSIONERS

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ALBANY:  
WEED, PARSONS AND COMPANY, PRINTERS.  
1864.



## PRELIMINARY NOTE.

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THIS volume contains the draft of a Penal Code for the State of New York. It has been prepared by the Commissioners of the Code, in pursuance of the directions contained in the act of the Legislature by which they were appointed,\* and is now distributed, as prescribed in that act, for the purpose of obtaining suggestions which may aid the Commissioners in completing and perfecting the Code, for submission to the Legislature.

In the compilation of the Penal Code the following have been the leading objects of the Commissioners:

1. To bring within the compass of a single volume the whole body of the law of crimes and punishments in force within this state. The existing statute law of crimes, though comprehensive, does not abrogate rules of the common law making criminal many acts which are untouched by statute; nor does it, in respect to crimes for which punishment is expressly prescribed, altogether dispense with the necessity of reference to the common law to

\* The act referred to is chapter 266 of the *Laws of 1857*. It directs the Commissioners to prepare three Codes; the POLITICAL CODE, the CIVIL CODE, and the PENAL CODE. It provides that the Penal Code must define all the crimes for which persons can be punished, and the punishment for the same; and that neither of the Codes shall embrace any provisions concerning actions or special proceedings, civil or criminal, or the law of evidence. The act further directs that whenever the Commissioners shall have prepared either Code, they shall cause it to be distributed among judges and other competent persons for examination, after which the Commissioners shall re-examine their work and consider such suggestions as have been made to them; and that they shall then cause the Codes, as finally agreed upon, to be reprinted and again distributed, six months before being presented to the Legislature.

determine what are the elements which constitute the offense. As long as the criminality of acts is left to depend upon the uncertain definitions or conflicting authorities of the common law, uncertainty must pervade our criminal jurisprudence. The value of the Penal Code must ultimately depend, in great measure, upon its containing provisions which embrace every species of act or omission which is the subject of criminal punishment. That this has been accomplished in the present draft, is not expected. But it should be understood that in so far as any act or neglect of duty, which upon a sound view of public policy ought to receive criminal punishment, is not made punishable by provisions of the Code, the omission is inadvertent, and if it is brought to the notice of the Commissioners, the defect will be supplied.

2. To supply deficiencies and correct errors in existing definitions of crimes. The statutory definitions of offenses, found in our existing law, are in many instances incomplete or inaccurate, and in some cases contradictory when compared with each other. They have been revised, and those which bear upon co-related crimes have been collated, in the desire to render each definition, as far as possible, complete in itself and independent, consistent with all definitions of analogous crimes, and accurate in including every grade of the prohibited act, which deserves punishment, and excluding every act which though partaking some element of the offense, is yet seen to be innocent.

3. To harmonize the provisions of punishment. The system of punishments instituted by the Revised Statutes was carefully devised, and was harmonious and well-proportioned; but later legislation has introduced many inequalities and disparities. In the present draft these have been, to a considerable extent, corrected. In general, however, for the higher crimes the punishments prescribed by the existing law have been retained, except where special reasons have called for a modification. While in

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respect to lesser crimes, the limit of power of the courts to impose fines for misdemeanors, in general, has been somewhat increased,\* and many crimes of inferior grade have been left to be punished as misdemeanors, the particular measure of punishment imposed by the existing law, being omitted.

4. To supply prohibitions of acts deserving of punishment, but not punishable by the present law. The progress of society creates new opportunities and new temptations to crime, which require to be met by new provisions of law. The statutes of other jurisdictions have been extensively consulted for provisions which might meet by anticipation new developments of crime; and the effort has been to adapt the Code as fully as possible to the wants of the present time.

If the views and purposes above mentioned, had been followed without qualification and restriction in the compilation of the Code, the result would have been quite different from that which has been reached. The Commissioners have, however, in a number of instances, felt restrained from framing provisions of the Code in the manner which has appeared absolutely best, by their sense of the dangers and evils attendant upon hasty innovations upon the existing law. They have, in fact, usually considered, in the first place, the existing statute law of the State relative to each crime, and so far as it has appeared correct and consistent, and was believed to have been approved in practical administration, it has been preserved; such modifications in phraseology being made, as were suitable to render the various sections of the Code as a whole, homogeneous. It has only been where alterations or additions of the law have been felt to be needed, that they have been introduced. Influenced by these considerations, the Commissioners have, in many instances, refrained from

\* See section 14 of the Code, and the note thereto.

## PRELIMINARY NOTE.

omitting a special prohibition of a particular species of act, even though they thought the provision needless for the reason that all acts of that class were embraced in a more general prohibition found elsewhere. Where a statute forbidding a particular species of acts has for years existed along with a general provision impliedly embracing the same cases, there is danger in omitting the special provision, however needless it may be, lest an inference should be drawn from the omission, that the act was designed to be made no longer punishable. Where provisions of existing statutes have been thought unobjectionable in themselves, but useless because embraced in effect in other provisions of a more general character, they have, therefore, in many cases been retained in this draft; in the belief that the omission of them may more safely be made in the ultimate revision of the work, than at present. And it will be found that the bulk of the Code, in its present shape, may be materially reduced without impairing its clearness and efficiency, by a rigid exclusion of particular provisions which are capable of being combined in general ones, accompanied by some enactment which shall prevent the argument that because a former prohibition of an act was omitted from the Code, therefore it must be deemed the intent of the Legislature that it should no longer be punishable.

It is to be borne in mind, that the subjects of procedure and evidence in criminal cases, are excluded from the scope of the Penal Code; those topics being embraced in the Codes reported by the commissioners of practice and pleadings. The Penal Code relates chiefly to the enumeration and definition of crimes, and the designation of the kind and measure of punishment to be inflicted for each. The first two titles of the Code, embody some general principles relative to criminal responsibility, which are independent of the distinctions between offenses. The fifteen titles which follow, and which constitute the bulk

of the work, are occupied with provisions relative to the various crimes, separately considered. The eighteenth title contains some general provisions concerning the interpretation and application of the preceding portions of the Code.

With these explanations, the work is submitted for examination. As an aid to a critical examination of it, there is appended to this note a TABLE OF THE PRINCIPAL CRIMES HERETOFORE RECOGNIZED IN THE JURISPRUDENCE OF GREAT BRITAIN OR AMERICA. This table is not precisely an index to the Code, though it will serve as such in a measure. It is intended as a means of testing the completeness of the provisions reported. It mentions the various crimes described in works on penal law, usually considered authorities in this country. If a crime is provided for by the Code, reference is given to the place where the provision may be found. If no provision has been made, the reason for the omission is briefly indicated.

The Commissioners cordially desire that all competent friends of law amendment will contribute the aid of criticism and suggestion towards the future revision of the work.

DAVID DUDLEY FIELD.  
WM. CURTIS NOYES.  
ALEXANDER W. BRADFORD.

*New York, March, 1864.*



A T A B L E  
OF THE  
PRINCIPAL CRIMES,

HERETOFORE RECOGNIZED IN THE  
LAW OF GREAT BRITAIN OR AMERICA,  
SHOWING  
WHERE THEY ARE TREATED IN THE PENAL CODE, OR, WHY THEY ARE  
OMITTED FROM IT.

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**Abandonment of children.**

This offense is covered by section 332 of the Penal Code.

**Abduction.**

This term is commonly used to designate taking a woman and compelling her to marry or to be defiled; accomplished by means of force used either at the taking, or at the marriage or defilement. This offense was made felony by *Stat.*, 2 *Hen. VII*, ch. 2, and benefit of clergy was taken away by *Stat.*, 39 *Eliz.*, ch. 9.

This crime is made punishable in part by section 319 of the Code; but chiefly by sections 326 and 327.

**Abortion.**

Using means to procure abortion is covered by section 334.

Submitting to attempt to procure abortion, by section 335.

Cases where death results are provided for by sections 249 and 250.

**Absence from church.**

The omission to attend church for one month, was made indictable by statute, in England. See *Stat.*, 23 *Eliz.*, c. 1, § 5; 3 *Jac.* 1, c. 4; 2 *Chitt. Cr. L.*, 20, note d. Similar statutes have at former times existed in this country.

No provisions *enforcing* attendance at church are introduced in the Code; though the right to attend is protected by sections 54, 55 and 56.

**Accessories.**

Accessories in felony are made punishable by section 28.

**Administering poison. See *Poison*.****Adulterations of food, &c.**

Are covered by sections 451, 452.

**Adultery.**

This is not criminally punishable by the English common law, though it is by the law of Scotland, and by the statutes of several of the United States.

In this state it has not been considered a subject of criminal punishment; and the question being a familiar one, and our existing rule well settled, the commissioners have not suggested any change.

**Affidavit.**

False swearing in an affidavit is made perjury by section 150.

Procuring another to make a false affidavit is subornation of perjury, by section 162.

The refusal of an officer to take and certify an affidavit, in a proper case, is covered by section 215.

Making an affidavit, or taking one in unauthorized cases, is covered by sections 181 and 182.

The refusal of an individual to make an affidavit is not made criminal, except so far as, under peculiar circumstances, it may constitute a criminal contempt of court, under section 201, subdivisions 4, 5 or 6. In general, the duty is left to be enforced by attachment or other appropriate civil remedy.

**Affray.**

At common law, the fighting together of two or more persons, in some public place, to the terror of the people. It is said to be

distinguishable from common assault and battery, in that it must, of necessity, occur in a public place; and from riot, in that two persons may commit an affray, while at least three are required to constitute riot.

In the Code, what would be an affray at common law, is left to be punished as a common assault and battery, under section 307; unless it is attended by circumstances which make it a duel, under section 293; or a riot, under section 474.

### Animals.

Injuries to property in animals are covered by sections 698 and 699; and see 702.

Cruelty to animals, by section 699; and see 702.

Instigating fights between animals, by sections 700 and 701.

The criminal responsibility of the owner of a mischievous animal which kills a human being, is defined by section 253.

### Apostacy.

A total renunciation of Christianity, by one who has once professed it, but afterwards embraces either a false religion or no religion at all. This was made punishable by 9 and 10 Wm. III, ch. 32.

It is not treated as a crime by the Code.

### Arresting a corpse.

Covered by section 359.

### Arson.

Originally, arson was the burning of a human habitation. The term has been, in this state, and in other jurisdictions, extended by statute, to embrace the burning of other descriptions of property not involving danger to human life.

In the Code, the term is used in its original and restricted sense. See sections 521-539.

Other criminal burnings are punishable as malicious mischief; under section 703.

### Artisans going abroad.

It was at one time criminal in England for artisans to leave the realm, with an intent to exercise their trade in a foreign country; though the rule is now abrogated.

This is not made punishable by the Code.

**Assault and Assault and Battery.**

Covered by sections 304-308.

**Assault with intent to kill.**

Covered by sections 278, 279.

**Assault with intent to commit other felony.**

Covered by sections 290, 292.

**Assignments.** See *Fraudulent assignments.***Attempts.**

As respects many crimes, the attempt is declared punishable equally with the commission.

Besides these provisions, attempts in general are covered by sections 745, 746.

**Attorneys.**

Buying demands to sue, is covered by section 194.

Lending money upon claims received for collection, by section 196.

Renewing application for stay of trial, without leave, by section 202.

Fraudulent practices, by section 209.

Allowing process to be wrongfully sued out in his name, by section 210.

Misconduct relative to criminal prosecutions, by sections 730, 731.

**Auctioneers.**

Various offenses by, are covered by sections 502-510.

**Bartraty.**

In the sense of misconduct by a ship master, this offense, so far as it is deemed a criminal offense properly cognizable by the law of this state, is covered by section 628. See also sections 630 and 632.

In the sense of stirring up suits and quarrels, barratry—or bartry—is covered by sections 190-193.

**Bathing in public.** See *Exposure of the person.*

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Battery. See *Assault*.

Bawdy houses.

Covered by sections 367, 369.

Begging.

Is not treated as a crime, but left to be dealt with under the provisions reported in the Code of Criminal Procedure, relative to vagrants, so far as they apply.

Bets and wagers.

In conformity with the existing law, these are made criminal in certain cases only. See sections 62, 388, 389, 390, 400, 486, 700.

Bigamy.

Covered by sections 338-340. See also section 341.

Black mailing. See *Extortion*.

Blasphemy.

Covered by sections 31-33.

Body snatching.

Covered by sections 355-357.

Breaking. See *Housebreaking*, *Pound Breach* and *Prison Breach*; also *Sabbath Breaking*.

Bribery.

Of electors, is covered by sections 61-65.

Of executive officers, by sections 98, 99, 102-109.

Of legislative officers, by sections 120, 121.

Of judicial officers, jurors, &c., by sections 125, 126, 127, 129.

Of witnesses, by sections 162-170.

Of officers or agents of the state employed on the canals, by sections 516, 517.

Buggery.

Is made punishable, though without employing this term, by sections 343, 344.

**Bull baiting.**

Covered by sections 701, 702.

**Burglary.**

Covered by sections 540-548.

**Burial.**

Violations of the right of, are covered by sections 345-362.

**Buying.**

A corpse for purposes of dissection is covered by section 356.

A public office, by section 106.

Lands in suit, by section 187.

Pretended titles, by section 188.

Demands for suit, by attorneys, &c., by sections 194, 195.

Lottery tickets, by section 374.

Stamped bottles, by section 417.

**Carnal abuse of children.**

Covered by section 319, subd. 1. See also sections 327-329.

**Carrying concealed weapons.**

Covered by section 455.

**Challenging.**

To fight a duel, is covered by section 297.

To engage in a prize fight, by sections 486, 487.

**Champerty.**

An agreement to assist another in prosecuting a suit, in consideration of receiving a share of the sum or property recovered.

So far as the contracts of this nature are criminal by our existing law, the provisions relating to them have been retained; without being extended. See sections 187, 188, 194-200.

**Cheats.**

Covered by sections 620-627.

**Children.**

Abandoning children, is covered by section 332.

Stealing, by section 337.

Fraudulently producing, by section 212.

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- Substituting one for another, by section 213.
- Neglect to provide for, by section 333.
- Concealing birth, or death of, by section 336.
- Carnal abuse of, by section 319.
- Enticing away for illicit purposes, by section 329.

### Cockfighting.

Covered by sections 701, 702.

### Compassing to kill the king.

This is mentioned as a specific offense by early English writers.

Under our elective form of government, no necessity has been felt for guarding the lives of executive officers, by provisions of law additional to those prescribed in favor of citizens; and no such provisions are embodied in the Code.

### Compounding crimes.

Covered by section 183.

### Compounding prosecutions.

Covered by section 184.

### Concealed weapons.

Carrying these, is covered by section 455.

### Conjuration, Divination, Fortune-telling, Enchantment, Magic, Prophesying, Sorcery, Witchcraft.

These have formerly been dealt with as crimes, upon the theory that it was possible that truth should be ascertained, or real effects produced, by supernatural means. In this aspect the law of this subject is obsolete.

Practices of pretending to exercise supernatural powers, or make pretended revelations, are left to the operation of the law relative to false pretenses or to vagrants.

### Conspiracy.

Covered by sections 224-226, 673.

### Contempts.

Such contempts as are deemed proper subjects of indictment, are made indictable, by section 201. See also 202-205.

**TABLE OF CRIMES.**

Contempts generally are left to be punished as such, by the appropriate proceeding for that purpose. See sections 740, 741, 785.

**Counterfeiting.**

Covered by sections 553-583.

**Crime against nature.**

Provided for by sections 343, 344.

**Cruelty to animals.**

Covered by sections 699-702.

**Cursing.**

Treated under the term "profane swearing," in sections 34-37.

**Cutting stamps.**

From writings, with intent to use them fraudulently upon other writings. This is made punishable in Eng., by 12 Geo. III, ch. 48.

This being a fraud upon the United States revenue, is left to be punished by the laws of the United States.

**Dacoity.**

This term is used in the recent Indian Penal Code to designate robbery committed by persons going in gangs for that purpose.

Without employing this name, an increased punishment is provided for this form of robbery by section 289.

**Defamation.**

Criminal penalties are not extended to slander.

Libel is covered by sections 309-318.

**Deforcement.**

In Scotch criminal law, an attempt to obstruct justice by hindering or resisting officers of the law in the execution of their duty.

The various forms of this offense are covered, without employing this name, by sections 59, 100, 101, 134, 135, 144, 180, 201, subd. 5, 224, subd. 5, 440, 475, subd. 2, 484, 501.

**Demembration.**

In Scotch law, the separation of any member from the body.

Is treated under the term "maiming" in sections 263-271.

**Desertion.**

Desertion of soldiers from military service. In England this was formerly a crime cognizable in the common law courts, though it is believed to be so no longer.

It is left by the Code to be dealt with by the military law. See section 785.

**Directors of corporations.**

Various offenses by, are covered by sections 646-668.

**Disorderly houses.**

Covered by sections 368, 369. See also section 675.

**Disorderly persons.**

This Code does not provide for disorderly persons, but leaves them to be dealt with under the system reported in the Code of Criminal Procedure.

**Dissection.**

Dissection of human bodies is made punishable, except in special cases, by section 349.

**Disturbing meetings.**

Disturbing religious meetings is covered by sections 55, 56.

Disturbing political meetings, by sections 79-81.

Disturbing funerals, by section 360.

Disturbing other lawful meetings, by section 473.

**Divination. See *Conjuration*.****Drunkenness. See *Intoxication*.****Dueling.**

Covered by sections 246, 293-303.

**Eavesdropping.**

At common law, the offense of listening about a dwelling house to hear and repeat what is said therein.

This offense is extended to relate to buildings generally, and made punishable by section 471.

**Elections.**

Frauds upon the elective franchise, and other infringements of the purity and freedom of elections, are provided for by sections 61-95.

**Embezzlement.**

The existing law relative to this offense is considerably enlarged and strengthened by sections 601-612.

**Embracery.**

At common law, the attempt to corrupt a jury.

Without using this term, the offense has been provided for, not only as respects juries, but also as to referees, arbitrators and all persons authorized to hear and determine a controversy, by sections 125, 131. See also sections 128, 129, 133.

**Engrossing.**

At common law, the buying up of large quantities of provisions with intent to raise the market price by creating a scarcity.

The tendency of our law being towards liberty in matters of trade, the mere purchasing of goods in quantities is not declared punishable by the Code. But the use of any fraudulent means to affect the market price of property is covered by section 469.

**Escape.**

The allowing a person lawfully in custody to depart from confinement; also the departure of such person from the place of confinement, if accomplished without breaking the same.

Covered by sections 136-146.

**Exercising trade.**

Exercising a trade without having served apprenticeship, was made indictable by *Stat.*, 5 *Eliz.*, ch. 4.

No such rule is deemed applicable in this state.

**Exporting.**

Exporting wool, leather, sundry metals, live sheep, &c., was formerly criminal in England. (3 *Co. Inst.*, 95-97, note.)

No such offense is recognized in the Code.

**Exposure of the person.**

Provided for by section 363.

**Extortion.**

Covered by sections 613-619.

**Falcon stealing.**

This was made felony by *Stat.*, 37 *Edw. III*, ch. 19; but that act amounts only, in fact, to declaring falcons, hawks, &c., property, therefore the subject of larceny.

General provisions upon the subject of larceny are given, in sections 584-600; but the question what is to be deemed property, is not within the scope of the Code.

**False personation.**

Covered by sections 620-622.

**False pretenses; False tokens.**

Obtaining property by false pretenses or tokens, is covered by sections 623-627.

**False weights and measures.**

Using them to defraud, is covered by sections 634-640.

**Forcible entry and detainer.**

Covered by section 492.

**Forcible marriage.** See *Abduction*.**Forestalling.**

As described by *Stat.*, 5 and 6 *Edw. VI*, ch. 44, consists in buying up merchandise on the way to market; or dissuading persons from bringing merchandise to market; or persuading them to enhance the price, when there.

The tendency of our law being towards liberty in matters of trade, these acts are not made punishable unless some false or fraudulent means are employed to affect the market price. That offense is covered by section 469.

**Forgery.**

Covered by sections 553-583.

**TABLE OF CRIMES.****Fornication.**

This is an indictable offense in Scotland and in several of the United States.

As it is not indictable by our existing law, and no new reasons are perceived for declaring it so, the commissioners have not urged any change.

**Fortune-telling. See *Conjuration*.****Frauds.**

In fitting out and destroying vessels, are covered by sections 628-630.

In destroying property insured, by sections 632, 633.

In use of false weights and measures, by sections 634-640.

In management of corporations, by 645-668.

In sale of passage tickets, by sections 669-682.

In relation to documents of title to merchandise, by sections 683-691.

To affect market price of merchandise, by section 469.

**Fraudulent assignments.**

Covered by sections 641-644.

**Fraudulent insolvencies.**

By individuals, are covered by sections 641-644.

By corporations, by sections 659, 660.

**Gambling, Gaming.**

Covered by sections 385-400.

**Gambling or Gaming houses.**

Prohibited by section 392, and see 397, 390.

**Game.**

The existing law for the preservation of game is continued in force, by section 786, subd. 23.

**Grand Larceny.**

Covered by sections 587, 589, 591, 592.

## TABLE OF CRIMES.

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### Hamesucken.

In Scotch law, the felonious seeking and invasion of a person in his dwelling house.

The burning of a dwelling house, is treated under the term "arson;" and breaking or entering a dwelling house, for criminal purposes, under "burglary." Except as provided under these heads, the Code does not, in general, regard the circumstance that a criminal injury was inflicted within the dwelling of the sufferer, as modifying the character of the crime.

### Health laws.

Violations of, are provided for by sections 435-441.

### Heresy.

Is enumerated among crimes by English authorities; as consisting, not in a total repudiation of Christianity, but in a denial of some of its essential doctrines, publicly and obstinately avowed.

The tendency of our law is so decided towards liberty in matters of religious faith, that provisions against heresy are clearly unsuitably embodied in the Code.

### Homicide.

Covered by sections 236-262.

### Horse racing.

Racing near a court, is prohibited by section 207.

For a bet or stake, by section 400.

Upon a highway, by section 472.

### House breaking.

Covered by section 550.

### Illegal voting.

Covered by sections 68-74.

### Incest.

Provided for by section 342.

### Indecent Exposures.

Provided for by section 363.

**Insolvencies.**

Fraudulent insolvencies by individuals are covered by sections 641-644.

Those of corporations, by sections 659, 660.

**Intoxication.**

Intoxication of physicians, is provided for by sections 257, 404.

Intoxication of persons employed on railroad trains, by section 462.

Intoxication in public places, by section 725.

**Keeping bawdy and disorderly houses.**

Covered by sections 367-369.

**Kidnapping.**

Covered by sections 272-276.

**Larceny.**

Covered by sections 584-600.

**Leasing making.**

In Scotch law, calumny directed against the king.

Under our elective form of government no necessity is perceived for punishing calumny affecting public officers, otherwise than as they share the protection accorded to citizens generally. No provisions on this subject are given in the Code.

**Libel.**

Covered by sections 309-318.

**Lotteries.**

Prohibited by sections 370-384.

**Magic. See *Conjuration*.****Maiming.**

Of persons, is covered by sections 263-271.

Of animals, by section 699.

**Maintenance.**

Officially intermeddling in a suit that no way belongs to one; by assisting either party, with money or otherwise, to prosecute or defend it.

In so far as intervening in a single lawsuit in which one is not a party, is criminal by our existing law, the provisions relative to it are retained, without being extended. See sections 187, 188, 194-200.

The *practice* of fomenting lawsuits is made punishable by sections 190-193.

**Malicious mischief.**

Covered by sections 696-722.

**Malpractice.**

As to malpractice by attorneys, see sections 194, 196, 202, 209, 210, 730, 731.

By physicians, 257, 404.

**Manslaughter.**

Covered by sections 248-259.

**Masquerades.**

Are covered by sections 478, 480.

**Mayhem. See *Maiming*.****Mock auctions.**

Covered by section 627.

**Multiplication of precious metals.**

This was formerly considered a crime in England. (3 *Co. Inst.*, 74.)

The impossibility of the act being now understood, the rule by which it was once thought punishable, is, of course, obsolete.

**Murder.**

Covered by sections 241-257.

**Mutilation.**

As to mutilations of persons and animals. See *Maiming*.

As to mutilations of written instruments. See sections 147, 148, 715, 716, 721.

**Nuisances.**

Punishable by sections 430-434.

**Obscene books and pictures.**

Covered by sections 363-366.

**Omitting to bury.**

Omitting to bury the body or remains of a dead person, is made punishable by sections 350-353.

**Perjury.**

Covered by sections 150-161.

**Petit Larceny.**

Covered by sections 586-588, 590.

**Prophesying. See *Conjuration*.****Petit treason.**

This offense was abolished by the Revised Statutes, and is not restored by the Code. See section 239.

**Piracy.**

Is left to be dealt with under the laws of the United States. Burning a vessel within this state is, however, made arson, by sections 521 and 522; and destroying or injuring vessels, or their cargoes, with intent to defraud insurers, &c., is punishable by sections 628-630.

**Poison.**

Administering stupefying drug to facilitate commission of felony, is covered by section 292.

Poisoning food, wells, &c., by section 405.

Selling poison without record and label, by sections 446-448.

Poisoning animals, by section 698.

**Posting.**

For not fighting a duel, is covered by section 300.

**Pound breach.**

It is doubted, in English law, whether breaking a pound to rescue cattle therefrom, when unaccompanied by any breach of the peace, should be deemed a criminal offense, or only a civil trespass.

It has not been thought needful to specify it as a crime in the Code. If the circumstances amount to resisting a public officer, or rescuing property from one, the act is punishable by sections 180, 185.

### Polygamy.

This offense is included in bigamy, which is covered by sections 338-340.

### Prison breach.

Covered by sections 136-146.

### Prize fights.

Covered by sections 485-491.

### Profane swearing.

Covered by sections 34-37.

### Racing. See *Horse Racing*.

### Rape.

Provided for by sections 319-324.

### Regrating.

As described by *Stat.*, 5 and 6 *Edw. VI*, ch. 14, is the buying up of provisions in any market and selling them again in the same market or within four miles of it.

The rule of the English law, punishing this, is deemed inapplicable at the present day in this state. See *Engrossing, Forestalling*.

### Receiving stolen goods.

Covered by section 598.

### Rescues.

Covered by sections 134, 135; see also 141-144.

### Reset of theft.

In Scotch law, is the receiving and keeping of stolen goods, knowing them to be such, and with intent to conceal them from the owner.

This offense is treated in the Code, but not under this name. See section 598.

**Resisting officers.**

- General resistance to a statute is covered by section 59.
- Resisting election officers, by sections 83, 84.
- Resisting executive and administrative officers generally, by sections 101, 180, 224, subd. 5, 475, subd. 2.
- Compelling adjournment of legislature, by section 115.
- Retaking goods from custody of officer, by section 135.
- Assisting prisoner to escape from officer, by section 144.
- Resisting execution of process, by sections 179, 484.
- Intimidating officer, by section 185.
- Obstructing health officer, by section 440.
- Obstructing revenue officer, by section 501.

**Returning from transportation.**

The provisions of the English statute upon the subject of returning from transportation before discharge are, of course, deemed inapplicable in this state.

**Riot.**

Covered by sections 474, 475, 481-483.

**Robbery.**

Covered by sections 280-289.

**Rout.**

Covered by sections 476, 479.

**Sabbath breaking.**

Covered by sections 38-52.

**Sacrilege.**

Provided for, without however employing this term, by sections 550, 704.

**Scolds.**

It has not been thought needful to continue the rule of the common law specifically punishing common scolds.

**Second offenses.**

Increased punishment for these is prescribed by sections 748-751.

**Seducing.**

Artisans to leave the realm, was formerly indictable in England, but is believed to be so there no longer.

No reason is perceived for creating such a crime in this state.

Seducing persons to serve a foreign prince as a soldier, was made felony by *9 Geo. II*, ch. 30, § 1.

This is left to be dealt with under the laws of the United States.

Seducing soldiers from their duty, was made punishable by *Stat., 37 Geo. III*, ch. 70.

This is not embraced in the Code, but left to be dealt with under the military law, or under the laws of the United States.

### **Seduction of females.**

The provisions of the existing law upon this subject are embodied in sections 328-331.

### **Selling liquor.**

In court houses or prisons, or near election polls, is made punishable by section 208.

Selling in violation of excise laws, by sections 724, 726-728.

### **Sepulture.**

Violations of the right of, are covered by sections 345-362.

### **Shooting.**

Covered by sections 278, 290, 308, 495.

### **Slander.**

Has never been recognized among crimes, in this state; and no reason has been perceived for a change in the law in this respect.

### **Smuggling.**

Is left to be dealt with under the laws of the United States.

### **Sorcery. See *Conjuration*.**

### **Seconding.**

Seconding a duel or prize fight, is covered by sections 296, 485.

### **Slung Shot.**

Carrying them, or using them, is covered by section 454.

### **Slave trade.**

Is left to be dealt with by the laws of the United States.

**Sodomy**

Is made punishable, without employing this term, by sections 343, 344.

**Sorning.**

The masterful taking of meat and drink without payment. 2 *Hume on Crimes*, 345. In the undisciplined state of society in Scotland, in early times, peculiar temptations to this offense existed, together with peculiar facilities for its commission; and it was therefore made a capital crime.

No reasons are perceived in the present state of society in this state for distinguishing the criminal taking of food or drink, from that of other property. This offense is therefore left to the general provisions relative to robbery, larceny, extortion, &c.

**Spies.**

Are left to be dealt with under the military law.

**Stouthrief.**

This is a general term employed in Scotch law, to designate all forcible thefts or depredations.

The offenses included in it are treated in the Penal Code under the appropriate titles of our law, such as "robbery."

**Striking with weapon—in a church or church-yard.**

This was made punishable by cutting off an ear, or branding, besides excommunication, by *Stat.*, 5 *Edw. VI*, ch. 4.

No reason is perceived why the law of New York should distinguish assaults in churches or church-yards, from those in other buildings or places.

**Subornation.**

Subornation of perjury is covered by sections 162, 163, and see 166–169, 170.

**Suicide.**

Covered by sections 227–235.

**Swearing.**

Treated under "profane swearing." See sections 34–37.

**Theftbute.**

In Scotch law, consists in a corrupt compact with a thief, whereby a person having him in his power, barters public justice for profit to himself; whether by taking a ransom from the thief to dismiss him, or by receiving a share of what he has stolen, to protect him.

This is covered by the provisions relative to compounding crimes and prosecutions; sections 183, 184.

**Threatening letters.**

Covered by section 618

**Threats.**

The use of threats is made punishable, in various cases, by sections 53, 54, 80, 81, 82, 100, 116, 131, subd. 3, 280–283, 300, 318, 458, 474, 614, 618, 733, 734.

**Trade marks.**

Counterfeiting them, is made punishable by sections 410–416.

**Treason.**

Covered by sections 57–60.

**Trespasses—to lands.**

So far as these are made punishable by the existing law, they are declared so by the Code, with some additional provisions. See sections 492, 493, 494, 705, 707–714.

**Tumultuous petitioning.**

By several English statutes, the right of assembling in numbers to present petitions to the king or parliament is restricted, under criminal penalties. See 13 *Car.* 2, c. 5; 57 *Geo. III*, ch. 19, § 23.

The provisions relative to riot, unlawful assemblies, &c., are all that are deemed necessary, in this state, upon this subject.

**Unlawful assemblies.**

Covered by sections 477–480, 482.

**Unlawful oaths.**

*Taking* an oath in any case not authorized by law, is covered by section 181.

*Administering* such an oath, by section 182.

**Usury.**

*Receiving usury* is made punishable by section 426 ; conformably to the existing law. It has not been thought desirable to extend the penalty to *paying usury*.

**Vagrants.**

The Code does not provide for vagrants, but leaves them to be dealt with under the system reported in the Code of Criminal Procedure.

**Wagers.** See *Bets*.**Witchcraft.** See *Conjuration*.

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THE  
P E N A L C O D E

OF THE  
STATE OF NEW YORK.

---

AN ACT  
TO ESTABLISH A PENAL CODE.

---

*The People of the State of New York, represented in  
Senate and Assembly, do enact as follows:*

PRELIMINARY PROVISIONS.

SECTION 1. Title of Code.

2. Its effect.
3. "Crime," and "Public offense," defined.
4. Crimes, how divided.
5. Felony defined.
6. Misdemeanor.
7. Objects of the Penal Code.
8. Conviction must precede punishment.
9. Jury are to find degree of crime.
10. Construction of the Penal Code.
11. Of sections declaring crimes punishable.
12. Punishments, how determined.
13. Punishment of felonies.
14. Of misdemeanors.

SECTION 1. This act shall be known as the PENAL Title of  
Code. CODE OF THE STATE OF NEW YORK.

## THE PENAL CODE

Its effect.

§ 2. No act or omission subsequent to the day upon which this Code shall take effect as a law, shall be deemed criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force. Any act or neglect committed prior to that day may be inquired of, prosecuted and punished in the same manner as if this Code had not been passed.

*Abolition of Common Law Offenses.*—This section abolishes all common law offenses. Such appears to have been clearly the intention of the legislature. The act appointing the commissioners prescribes that “the Penal Code must define all the crimes for which persons can be punished.”

*Effect of the Code upon Anterior Offenses.*—In so far as this Code declares acts criminal which heretofore have not been so regarded, or increases the severity or changes the kind of punishment inflicted for a crime defined by our former laws, the familiar provision of the Federal Constitution prohibiting *ex post facto* laws, forbids that it be made applicable to acts committed before it takes effect. (*U. S. Const.*, art. 1, § 10, sub. 1; *Calder v. Bull*, 3 *Dall.*, 386; *Fletcher v. Peck*, 6 *Cr. 87*, 138.) In so far as it diminishes the severity of the punishment, by prescribing a less amount or duration of penalty, of the same kind with that inflicted under the former law, there may be no constitutional reason to prevent its being made applicable to all offenses, irrespective of the date of commission. (*Hartung v. People*, 22 *N. Y.*, 95; *Commonwealth v. Mott*, 21 *Pick.*, 492; *Keene v. State*, 3 *Chandl.*, 109.) Ameliorations of punishment introduced by statute are often expressly extended to prior offenses. (See 2 *Rev. Stat.*, 779, § 6; *Laws of 1861*, ch. 303, § 3; *Mass. Gen. Stat.*, 880, § 5; *Rev. Stat. of Wisc.*, 757, § 3.) No natural right arises, however, in behalf of an offender, to claim the benefit of a subsequent statute mitigating the penalty for offenses like his own; though clemency readily awards it to him. Convenience and simplicity in the administration of penal justice should control upon this point. The commissioners are of opinion that any attempt by general words to render such mitigations of punishment as are introduced by the Code, applicable to antecedent offenses, is calculated to raise nice and embarrassing questions as to whether a given modification is a mitigation or not. They observe that it has been held that the judiciary cannot determine whether a provision that no person convicted of a capital offense

shall be executed until after a year's confinement, nor then except upon special warrant from the governor — is or is not less severe than a former law imposing absolutely the punishment of death. (*Hartung v. People*, 22 N. Y., 95, 106.) Also that a substitution of imprisonment not exceeding seven years, for whipping, has been held not an increase of punishment. (*Strong v. State*, 1 *Blackf.*, 193; *Herber v. State*, 7 *Tex.*, 69.) They therefore recommend that, as it is necessary to retain the former system of prohibitions and penalties to a great extent, as respects acts already committed, it be retained complete.

Should it be thought desirable to give those whose offenses were committed prior to the Code, the benefit of any ameliorations of punishment introduced, the courts might be relieved of weighing the comparative severity of penalties, by a provision entitling a person convicted, after the Code, of an offense committed before it took effect, the right to elect, at the time of sentence being pronounced, the punishment prescribed by the former law, instead of that authorized by the new. The commissioners, however, deem such a provision inexpedient.

**3. A crime or public offense is an act or omission  
bidden by law, and to which is annexed, upon con-**

"Crime"  
and "pub-  
lic offense,"  
defined.

**on, either of the following punishments:**

**Death ;**  
**Imprisonment ;**  
**Fine ;**  
**Removal from office ; or,**  
**Disqualification to hold and enjoy any office of  
trust, or profit under this state.**

*Rep. Code Cr. Pro.*, 2, § 3.

The use of the terms "crime," "felony," "misdemeanor" and "offense," is far from uniform even among legal writers. In addition to the definition given by Mr. Livingston (and referred to *Rep. Code Cr. Pro.*, 2, note), the following may be mentioned:

"A crime, or misdemeanor," says Blackstone, "is an act committed or omitted in violation of a public law, either forbidding or commanding it." "Crimes and misdemeanors, properly speaking, are synonymous terms; though in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye."

## THE PENAL CODE

"Misdemeanor," says Christian, "is generally used in contradiction to felony; and misdemeanors comprehend all indictable offenses, which do not amount to felony." (*Note to 4 Bl. Comm.*, 5.)

"Misdemeanor," says Chitty, "means every offense inferior to felony, but punishable by indictment, or by particular prescribed proceedings. The term 'offense' is usually understood to be a crime *not indictable*, but *punishable summarily*, or by the forfeiture of a *penalty*." (1 *Gen. Pr.*, 14.)

"A crime," says Bell, "may be defined to be any act done in violation of those duties which an individual owes to the community, and for a breach of which the law has provided that the offender shall make satisfaction to the public." (*Dict. L. of Scot.*, tit. Crime.)

Bishop defines crimes as "those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name" (1 *Cr. L.*, § 43.)

"The word *crime*," says Chief Justice SAVAGE, of our own State, speaking of the clause in the Federal Constitution which provides for the extradition of persons charged with *treason, felony, or other crime*, "is synonymous with misdemeanor, and includes every offense below felony punished by indictment as an offense against the public." (Matter of Clark, 9 *Wend.*, 212, 222.)

"The term *misdemeanor*," says the same judge, in another case, "is used in contradistinction to *felony*, and comprehends all indictable offenses which do not amount to *felony*." (Son *v.* People, 12 *Wend.*, 314.)

The Revised Statutes of this State, have employed the terms "crime" and "offense" as equivalent to each other, and as denoting "any offense for which any criminal punishment may by law be inflicted" (2 *Rev. Stat.*, 702, § 22); and have defined "felony" as an offense punishable by death or imprisonment in State prison.

The commissioners have based their definitions upon the usage which has grown up in this State under the Revised Statutes; employing "crime" and "offense" in the extensive signification, and confining "felony" and "misdemeanor" to denote the classes into which crimes are divided. (See also *Rep. Code of Cr. Pro.*, 3, § 5, note.)

Crimes,  
how  
divided.

### § 4. Crimes are divided into

1. Felonies ;
2. Misdemeanors.

**§ 5. A felony is a crime which is, or may be, punishable with death, or by imprisonment in a State prison.**

See *Rep. Code Cr. Pro.*, 3, § 5.

Felony defined.

**§ 6. Every other crime is a misdemeanor.**

*Rep. Code Cr. Pro.*, 3, § 6.

Misde-meanor.

**§ 7. This Code specifies the classes of persons who are deemed capable of crimes, and liable to punishment therefor; and defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each. The manner of prosecuting and convicting criminals is regulated by the Code of Criminal Procedure.**

Objects of the Penal Code.

**§ 8. The punishments prescribed by this Code can be inflicted only upon a legal conviction in a court having jurisdiction.**

Conviction must precede punishment.

A similar provision has already been reported in the Code of Criminal Procedure. (§ 7.) As however the language employed in the various sections of the Penal Code, prescribing punishments, requires some such general restriction to render it accurate, the commissioners have repeated the provision here, in order that each Code may be, as far as possible, complete and independent, and that the legislature may have it in their power to consider either, without being embarrassed by its connection with others. The same consideration has induced them in a number of instances to insert a provision deemed necessary to the completeness of the Code, notwithstanding that it has been embodied in one of the Codes already reported, and now before the Legislature for its consideration.

**§ 9. Whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, shall find the degree of the crime, of which he is guilty.**

Jury are to find degree of crime.

**§ 10. The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.**

Construction of the Penal Code.

## THE PENAL CODE

Of sections  
declaring  
crimes  
punishable.

§ 11. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.

Punish-  
ments, how  
determined

§ 12. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case shall be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code.

Punish-  
ment of  
felonies.

§ 13. Except in cases where a different punishment is prescribed by this Code or by some existing provision of law, every offense declared to be felony is punishable by a fine not exceeding one thousand dollars or by imprisonment in a state prison not exceeding two years, or by both such fine and imprisonment.

Punish-  
ment of  
misde-  
meanors.

§ 14. Except in cases where a different punishment is prescribed by this Code, or by some existing provisions of law, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Based upon 2 *Revised Statutes*, 597, § 40; which provided that misdemeanors for which no punishment was expressly provided, should incur a year's imprisonment, or a fine of two hundred and fifty dollars. In raising the limit of the fine to five hundred dollars, the commissioners do not intend to intimate that cases formerly coming within the operation of the general provision should incur a higher fine; but merely to simplify the provisions of the Code by allowing the general provision to cover misdemeanors of a more aggravated character, than were embraced by the section of the Revised Statutes referred to.

# OF THE STATE OF NEW YORK.

7

## TITLE I.

### OF THE PERSONS LIABLE TO PUNISHMENT FOR CRIME.

- SECTION 15.** Who are liable to punishment.  
16. Who are capable of committing crimes.  
17. Intoxicated persons.  
18. Morbid criminal propensity.  
19. Insane persons, acquitted, how disposed of.  
20. Involuntary subjection.  
21. Subjection by duress.  
22. Subjection inferred from coverture.  
23. When not inferred.  
24. Inference may be rebutted.  
25. Exemption of public ministers.

§ 15. The following persons are liable to punishment under the laws of this State:

Who are  
liable to  
punish-  
ment.

1. All persons who commit, in whole or in part, any crime within this State;
2. All who commit theft out of this State, and bring, or are found with the property stolen, in this State;
3. All who, being out of this State, abduct or kidnap, by force or fraud, any person contrary to the laws of the place where such act is committed, and bring, send or convey such person within the limits of this State, and are afterwards found therein ;
4. And all who, being out of this State, cause or aid, advise or encourage, another person, causing an injury to any person or property within this State by means of any act or neglect which is declared criminal by this Code, and who are afterwards found within this State.

The principles embodied in this section are also presented, viewed from a somewhat different point, in the Reported Code of Criminal Procedure (§§ 127-137), coupled with provisions distinguishing the proper county for the trial of various offenses. The question of county jurisdictions belong wholly to the Code of Procedure. But the jurisdiction of the State over offenses planned or in part committed outside its boundaries, ought to be asserted in this Code, unless elsewhere enacted. The

## THE PENAL CODE

principle has therefore been restated; although in language somewhat different from that employed in the Code of Criminal Procedure.

*Subd. 2.*—Subdivision 2 of this section embodies the rule prescribed by 2 Rev. Stat., 698, § 4. The familiar rule of the English law was that one who committed theft in one county, and carried the stolen goods into another county, might be tried in the latter county; the detaining of the goods there being deemed a continuance of the theft. The former cases in this State held that no such rule was applicable, where property was stolen in another of the United States, and brought into this State. (People *v.* Gardner, 2 John., 477; McCullough's case, 2 City H. Rec., 45.) The contrary view was, however, adopted by the Supreme Court of Massachusetts, (Commonwealth *v.* Cullins, 1 Mass., 116; Same *v.* Andrews, 2 *Id.*, 14,) which held that there was a sufficient analogy between the different States comprising the Federal Union, and the counties of a single State, to justify the adoption of the English rule. The Revised Statutes following these Massachusetts decisions (see *Revisers' Notes*), prescribed the same rule. The commissioners now propose that it be extended to thefts committed out of the State, whether in another state of the Union, or elsewhere.

*Subd. 3.* The third subdivision is new; but is suggested as a parallel provision applicable to the case of abduction of the person. It has been held that such abduction furnishes no ground for a *civil action for damages* in the courts of this State. (Malony *v.* Dows, 8 Abbott's Pr., 316.) Conceding this to be so, it is conceived that cases may arise in which the State may be interested to *punish* the act.

Who are  
capable of  
committing  
crimes.

### § 16. All persons are capable of committing crimes, except those belonging to the following classes:

1. Children under the age of seven years;
2. Children of the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew its wrongfulness;
3. Idiots;
4. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time

of committing the act charged against them, they were incapable of knowing its wrongfulness;

5. Persons who committed the act, or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent. But ignorance of the law does not excuse from punishment for its violation;

6. Persons who committed the act charged without being conscious thereof;

7. Persons who committed the act, or made the omission charged while under involuntary subjection to the power of superiors.

*Subd. 4.* As drafted, this subdivision expresses the rule of the common law as very uniformly understood and practised, until within a recent period. (McNaughton's case, 1 *Townsend's St. Tr.*, 312, 401.) Within a few years past, some respectable authorities in medical jurisprudence, and some adjudications in cases involving civil rights, have advanced the view that any mental aberration, any monomania however limited in subject, is to be deemed a disease of the mind, as a unit, necessarily involving and embarrassing all the mental action of the individual. That what have been heretofore deemed partial insanities, are in truth special developments of a disease of the mind, which is necessarily so fundamental as to render its soundness, even upon subjects furthest removed from the particular hallucination exhibited, wholly uncertain. (*Waring v. Waring*, 12 *Jurist*, O. S. C. S., 948; *Moore's Privy Co. R.*; *Ray's Med. Jur. of Insanity*, 2 ed., 27, 29.) If this view shall be deemed sound, and to be a proper element in the criminal jurisprudence of insanity, a question will arise which is now suggested only for the consideration of the Legislature; whether the last clause of the subdivision—the words "upon proof that, &c., they were incapable of knowing its wrongfulness," may be omitted.

§ 17. No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the

Intoxicated persons.

accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

*People v. Rogers*, 18 N. Y. (4 *Smith*), 9; *People v. Hammill*, 2 *Park. Cr.*, 223; *People v. Robinson*. *Id.*, 235.

Morbid  
criminal  
propensity.

§ 18. A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

The validity of this defense was thoroughly discussed in the late case of Huntington, in this State; where the earlier authorities will be found collected. (See *Trial of Huntington*.)

Insane per-  
sons, ac-  
quitted,  
how dis-  
posed of.

§ 19. When a jury have returned a verdict acquitting a defendant upon the ground of insanity, the court may thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public safety, order him to be committed to the State lunatic asylum till he becomes sane.

*Rep. Code Cr. Pro.*, § 511.

Involuntary  
subjection.

§ 20. The involuntary subjection to the power of a superior, which exonerates a person charged with a criminal act or omission from punishment therefor, arises either from

1. Duress; or,
2. Coverture.

Subjection  
by duress.

§ 21. The duress which excuses a person who has committed a prohibited act or neglect from punishment, must be an actual compulsion by use of force.

Subjection  
inferred  
from  
coverture.

§ 22. A subjection sufficient to excuse from punishment may be inferred in favor of a wife, from the fact of coverture, whenever she committed the act charged, in the presence and with the assent of her husband; except where such act is a participation in:

1. Treason;

2. Murder;
3. Manslaughter;
4. Maiming;
5. An attempt to kill;
6. Rape;
7. Abduction;
8. Abuse of children;
9. Seduction;
10. Abortion, either upon herself or another female;
11. Concealing the death of an infant, whether her own or that of another;
12. Fraudulently producing a false child, whether as her own, or as that of another;
13. Bigamy;
14. Incest;
15. The crime against nature;
16. Indecent exposure;
17. Obscene exhibitions of books and prints;
18. Keeping a bawdy or other disorderly house;
19. Misplacing a railway switch; or,
20. Obstructing a railway track.

Treason and murder have long been recognized as exceptions to the rule which exempts a wife from punishment for an act committed in her husband's presence. Other offenses have been considered exceptions by many authorities. The commissioners have deemed it desirable to specify the excepted crimes with precision, and to extend the list to all which are of so grave and clearly marked a character, or relate so closely to the sex, and peculiar duties, privileges, or rights of woman, that a female cannot be supposed to be misled in regard to the character of her act, by the influence of her husband.

That a wife should aid her husband in the commission of a rape, a seduction, or of either of the similar crimes mentioned in the foregoing list, is doubtless improbable. But the supposition of such a case as possible seems justified by the conviction of Lord Audley, for forcibly assisting one of his servants to commit a rape upon his wife. (3 *How. St. Tr.*, 402.)

When not inferred.

§ 23. In case of the crimes enumerated in the last section, the wife is not excused from punishment by reason of her subjection to the power of her husband, unless the facts proved show a case of duress as defined in section 21.

Inference may be rebutted.

§ 24. The inference of subjection arising from the fact of coverture may be rebutted by any facts showing that in committing the act charged the wife acted freely.

The proof of marriage requisite to entitle a woman to the benefit of this exemption, is intended to be left to the operation of the ordinary rules applicable to the proof of that relation in other cases.

Exemption of public ministers.

§ 25. Ambassadors and other public ministers from foreign governments, accredited to the President or Government of the United States, and recognized by it according to the laws of the United States, with their secretaries, messengers, families and servants, are not liable to punishment in this State, but are to be returned to their own country for trial and punishment.

*Wheat. Int. L., 264, § 6; 271, § 14; Vattel, 470, § 91 and onward; 1 Bish. Cr. L., § 585; Act of Cong. of Apr. 30, 1790, ch. 9, § 25.*

## TITLE II.

### OF PARTIES TO CRIMES.

#### SECTION 26. Classification of parties to crimes.

27. Who are principals.
28. Who are accessories.
29. No accessories in misdemeanor.
30. Punishment of accessories.

Classification of parties to crimes.

§ 26. The parties to crimes are classified as ·

1. Principals; and,
2. Accessories.

§ 27. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals. Who are principals.

See *Rep. Code Cr. Pro.*, 156, § 310.

§ 28. All persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment, are accessories. Who are accessories.

See *Rep. Code Cr. Pro.*, 156, § 311, note, for reasons why the commissioners recommend the abrogation of the distinction between an accessory before the fact, and a principal. That distinction being abrogated, there is no longer a need of retaining the phrase "accessory *after the fact*."

The above definition of an accessory corresponds with the definition of an accessory after the fact, as given in 2 *Rev. Stat.*, 699, § 7.

§ 29. In misdemeanor there are no accessories. No accessories in misdemeanor.

§ 30. Except in cases where a different punishment is prescribed by law, an accessory to a felony is punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. Punishme't of accessories.

2 *Rev. Stat.*, 699, § 7.

### TITLE III.

#### OF CRIMES AGAINST RELIGION AND CONSCIENCE.

##### SECTION 31. Blasphemy defined.

- 32. Words used in serious discussion.
- 33. Blasphemy a misdemeanor.
- 34. Profane swearing defined.
- 35. Punishment of profane swearing.
- 36. Summary conviction for profane swearing.

## THE PENAL CODE

- SECTION 37.** Penalties, how collected.  
 38. The Sabbath.  
 39. Sabbath breaking.  
 40. Day defined.  
 41. Sabbath breaking defined.  
 42. Servile labor.  
 43. Undue travel.  
 44. Persons observing another day as a Sabbath.  
 45. Public sports.  
 46. Trades, manufactures, and mechanical employments.  
 47. Public traffic.  
 48. Serving process.  
 49. Punishment of Sabbath breaking.  
 50. Forfeiture of commodities exposed for sale.  
 51. Proceedings to collect fines imposed by this Chapter.  
 52. Remedy for maliciously serving process.  
 53. Compelling adoption of a form of belief.  
 54. Preventing performance of religious act.  
 55. Disturbing religious meetings.  
 56. Definition of the offense.

**Blasphemy  
defined**

**§ 31.** Blasphemy consists in wantonly uttering or publishing words casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures or the Christian religion.

A variety of definitions of this offense have been given by different authorities, upon a review of which the foregoing definition is based. (Consult Commonwealth *v.* Kneeland, 20 *Pick.*, 213; S. C., *Thach. Cr. Cas.*, 346; Updegraff *v.* Commonwealth, 11 *Serg. & R.*, 406; People *v.* Ruggles, 8 *Johns.*, 290; State *v.* Chandler, 2 *Harris.*, 553; *Eml. Pref. to St. Tr.*, 8; 2 *Bish. Cr. L.*, § 69; Starkie, *Lib.*, 496; 1 *Hawk. P. C.*, 12; 1 *Hume Or. L.*, 559.)

It was held in People *v.* Porter (2 *Park. Cr.*, 14), that if no person hears the words complained of, no crime is committed; but that element of the offense seems sufficiently suggested by the words "uttering or publishing."

**Words used  
in serious  
discussion.**

**§ 32.** If it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy.

This is a well settled restriction upon the definitions of blasphemy. (People *v.* Ruggles, 8 *Johns.*, 290; Com-

monwealth *v. Kneeland*, 20 *Pick.*, 213; S. C., *Thach. Cr. Cas.*, 356; *Starkie Lib.*, 496.) The favor which the law shows towards liberty of speech, and the free discussion of religious opinions, forbids that the sincere expression of belief, however erroneous, should be embarrassed by the penalty of blasphemy.

**§ 33. Blasphemy is a misdemeanor.**

Blasphemy  
a misde-  
meanor.

**§ 34. Profane swearing consists in any use of the name of God, or Jesus Christ, or the Holy Ghost, either in imprecating divine vengeance upon the utterer or any other person, or in light, trifling or irreverent speech.**

Profane  
swearing  
defined.

**§ 35. Every person guilty of profane swearing is punishable by a fine of one dollar for each offense.**

Punish-  
ment of  
profane  
swearing.

Based on 1 *Rev. Stat.*, 673, § 61.

**§ 36. Whenever any profane swearing is committed in the presence and hearing of any justice of the peace, mayor, recorder or alderman of any city, while holding a court, or under any other circumstances such as in the opinion of the magistrate amount to a gross violation of public decency, such magistrate may, in his discretion, immediately convict the offender, without any other proof.**

Summary  
conviction  
for profane  
swearing.

Based on 1 *Rev. Stat.*, 674, §§ 61, 62.

**§ 37. If the offender does not forthwith pay the penalties incurred, with the costs, or give security for their payment within six days, he shall be committed by warrant to the county jail, for every offense or for any number of offenses whereof he was convicted at one and the same time, for not less than one day, nor more than three days ; there to be confined in a room separate from all other prisoners.**

Penalties,  
how col-  
lected.

1 *Rev. Stat.*, 674, § 63.

**§ 38. The first day of the week being by very general consent set apart for rest and religious uses, the law forbids to be done on that day certain acts deemed useless and serious interruptions of the repose and religious liberty of the community.**

The Sab-  
bath.

**Sabbath breaking.** § 39. Any violation of this prohibition is Sabbath breaking.

These sections, and the twelve which follow, are proposed as substitutes for the provisions upon the same subject which are embodied in sections 849 to 851 inclusive, and in section 853 of the Political Code. The Revised Statutes treated the observance of Sunday not among crimes, but as a branch of the internal police management of the State. In order that it might be considered in that connection the Commissioners presented in the Political Code, the provisions contained in the Revised Statutes. They recommend, however, that so far as the *definition* and *punishment* of Sabbath breaking are concerned, the offense should be treated in the Penal Code; while the special provisions found in the Revised Statutes, and incorporated into the Political Code, respecting the *proceedings* to enforce the law, if desired to be preserved, may either be retained in the Political Code, or transferred to the Code of Criminal Procedure.

The sections as now reported present some modifications in the existing law, intended to render it more conformable to public sentiment at the present day.

**Day defined.**

§ 40. Under the term "day," as employed in the phrase "first day of the week," in the eight sections following, is included all the time from midnight to midnight.

**Sabbath breaking defined.**

§ 41. The following are the acts forbidden to be done on the first day of the week, the doing any of which is Sabbath breaking :

1. Servile labor ;
2. Undue travel ;
3. Public sports ;
4. Trades, manufactures, and mechanical employments ;
5. Public traffic ;
6. Serving process.

**Servile labor.**

§ 42. All manner of servile labor, on the first day of the week, is prohibited, excepting works of necessity or charity.

§ 43. All traveling on the first day of the week is prohibited, excepting such as is performed upon foot or in carrying or in a conveyance carrying the United States mail, or such as is done in cases of charity or necessity, or in going to or returning from some funeral, place of worship, or religious assembly within the distance of twenty miles, or in going for medical aid or for medicines and returning, or in visiting the sick and returning, or in going express by order of some public officer, or in removing one's family or household furniture when such removal was commenced on some other day.

Founded on 1 *Rev. Stat.*, 675, § 70. Exceptions in favor of travel on foot and in a conveyance carrying the U. S. mail, are introduced as harmonizing with the view by which the commissioners have been governed throughout, in preparing these sections, viz.: that whatever does not interrupt the rest and religious observance of others, should be left to private conscience. As the State law cannot interfere with the carrying the mail, no important additional element of disturbance is introduced by excepting travelers accompanying it from these prohibitions.

§ 44. It is a sufficient defense in proceedings for servile labor or undue travel on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time, and does not labor or travel upon that day, and that the labor or travel complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

§ 45. All shooting, hunting, fishing, sporting, playing, horse racing, gaming or other public sports, exercises or pastimes, upon the first day of the week, are prohibited.

1 *Rev. Stat.*, 675, § 70, modified.

§ 46. All trades, manufactures and mechanical employments upon the first day of the week are prohibited.

**Public traffic.**

§ 47. All manner of public selling, or offering, or exposing for sale publicly, of any commodities upon the first day of the week is prohibited, except that meats, milk and fish may be sold at any time before nine o'clock in the morning, and except that food may be sold to be eaten upon the premises where sold, and drugs and medicines and surgical appliances may be sold at any time of the day.

Founded on 1 *Rev. Stat.*, 676, § 71; the restriction upon restaurants and drug stores being removed.

**Serving process.**

§ 48. All service of legal process of any description whatever, upon the first day of the week, is prohibited, except in cases of breach of the peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime; or except where such service shall be specially authorized by law.

Founded on 1 *Rev. Stat.*, 674, § 69.

**Punishment of Sabbath breaking.**

§ 49. Every person guilty of Sabbath breaking is punishable by a fine of one dollar for each offense.

**Forfeiture of commodities exposed for sale.**

§ 50. In addition to the fine imposed by the last section, all commodities exposed for sale on the first day of the week in violation of the provisions of this chapter shall be forfeited. Upon conviction of the offender by any justice of the peace of the county, or mayor, recorder or alderman of the city, such officers shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds shall be paid to the overseers of the poor for the use of the poor of the town or city.

*Rep. Pol. Code*, § 851.

**Proceedings to collect fines imposed by this chapter.**

§ 51. The fines prescribed in this chapter for profane swearing and for Sabbath breaking, may be collected by means of the proceedings prescribed by sections 854 to 858 inclusive, of the Political Code.

See note to section 39, *supra*. If the sections of the Political Code relative to the observance of Sunday are stricken out as suggested in the former note, some verbal changes will be required in section 854 and others regulating the procedure peculiar to that offense.

§ 52. Whoever maliciously procures any process in a civil action to be served on Saturday upon any person who keeps Saturday as holy time and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

*Remedy for maliciously serving process.*

Substituted for section 853 of the Political Code. Section 852, belongs appropriately to that Code.

§ 53. Any willful attempt by means of threats or violence, to compel any person to adopt, practice or profess any particular form of religious belief, is a misdemeanor.

*Compelling adoption of a form of belief.*

This section is by no means intended to restrict the authority of parents to instruct their children, or to require them to attend upon public worship or places of religious instruction. It only forbids compelling another to espouse a particular form of belief.

§ 54. Every person who willfully prevents by threats or violence another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

*Preventing performance of religious act.*

§ 55. Every person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts or things hereinafter enumerated, is guilty of a misdemeanor.

*Disturbing religious meetings.*

§ 56. The following are the acts deemed to constitute disturbance of a religious meeting :

*Definition of the offense.*

1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting;

2. Exposing to sale or gift any ardent or distilled liquors, or keeping open any huckster shop within

two miles of the place where any religious society or assembly shall be actually convened for religious worship, and in any other place than such as shall have been duly licensed and in which the person accused shall have usually resided or carried on business;

3. Exhibiting within the like distance, any shows or plays without a license by the proper authority ;

4. Engaging in, or aiding or promoting, within the like distance, any racing of animals or gaming of any description ;

5. Obstructing in any manner, without authority of law, within the like distance, the free passage along any highway to the place of such meeting.

## TITLE IV.

### OF TREASON.

#### SECTION 57. Treason defined.

58. Levying war defined.

59. Resistance to a statute, when levying war.

60. Punishment,

Treason defined.

§ 57. The following acts constitute treason against the people of this State:

1. Levying war against the people of this State, within the State; or,

2. A combination of two or more persons, by force to usurp the government of this State, or to overturn the same, evidenced by a forcible attempt made within this State to accomplish such purpose; or,

3. Adhering to the enemies of this State while separately engaged in war with a foreign enemy in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort in this State or elsewhere.

§ 58. To constitute levying war against the people of this State, an actual act of war must be committed. *Levying war defined.*  
To conspire merely to levy war is not enough.

*Ex parte Bollman*, 4 Cr., 75, 126.

§ 59. Where persons rise in insurrection with intent to prevent in general by force and intimidation, the execution of a statute of this State, or to force its repeal, they are guilty of levying war. But an endeavor, although by numbers and force of arms to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

*Resistance to a statute, when levying war.*

*Levying war.*—The above section is based on the cases of *United States v. Mitchell*, 2 Dall., 348; *United States v. Hanway*, 2 Wall., Jr., 139, 203; *United States v. Hoxie, 1 Paine*, 264; *United States v. Vigol*, 2 Dall., 346. These cases (as well as that of *ex parte Bollman*, *supra*,) were all decided in the federal courts, and involved the question what is to be deemed levying war against the United States, under the constitutional definition of treason. (*U. S. Const.*, art. 3, § 3.) They have given a settled construction to the phrase "levying war," which is equally applicable to a definition of treason against a state.

*Outlawry for treason.*—Proceedings of outlawry for treason are prescribed by *Rep. Code Cr. Pro.*, §§ 884-896.

*Number of witnesses.*—A provision that in prosecutions for treason, two witnesses to the same overt act shall be required, is already reported. (*Rep. Code Civ. Pro.*, § 1782.)

§ 60. Every person convicted of treason shall suffer *Punishment.*  
death for the same.

*2 Rev. Stat.*, 656, § 1. Provisions regulating the manner of inflicting the penalty of death have been already reported. (*Rep. Code Cr. Pro.*, §§ 556-574.)

## TITLE V.

### OF CRIMES AGAINST THE ELECTIVE FRANCHISE.

- SECTION 61. Bribery, menace and other corrupt practices, at elections.  
 62. Betting upon elections.  
 63. Unlawful offers to procure offices for election.  
 64. Communicating such offers.

## THE PENAL CODE

- SECTION 65.** Furnishing money for elections, except for specified purposes.
- 66. Defrauding an elector in his vote.
  - 67. Obstructing electors in attending elections.
  - 68. Voting more than once.
  - 69. Procuring illegal votes.
  - 70. Importing voters who are unqualified.
  - 71. Illegal voting by inhabitants of another state.
  - 72. Illegal voting by inhabitants of this state.
  - 73. Illegal voting by resident of different election district.
  - 74. Illegal voting by unparoled convict.
  - 75. Procuring name to be registered improperly.
  - 76. Personating registered voters.
  - 77. False statements upon applying for registry.
  - 78. What is deemed a false statement.
  - 79. Disturbance of public meetings.
  - 80. Preventing public meetings.
  - 81. Preventing electors from attending public meetings.
  - 82. Preventing electors from voting.
  - 83. Disobedience to lawful commands of inspectors.
  - 84. Riotous conduct, or violence, which impedes elections.
  - 85. Summary arrest therefor.
  - 86. Such arrest no bar to a subsequent prosecution.
  - 87. Destroying ballots or ballot-boxes.
  - 88. Keeping false poll lists.
  - 89. Misconduct of inspectors.
  - 90. Falsely canvassing votes, or certifying result of election.
  - 91. Election defined.
  - 92. Irregularities in election no defense for violations of this chapter.
  - 93. Rights of persons lawfully interfering in elections declared.
  - 94. Submission of questions to the people.
  - 95. Good faith in offering to vote, a defense for alleged illegal voting.

Bribery,  
menace and  
other cor-  
rupt prac-  
tices, at  
elections.

§ 61. Every person who by bribery, menace or any other corrupt means, either directly, or indirectly, attempts to influence any elector of this State in giving his vote, or to deter him from giving the same, or to disturb or hinder him in the free exercise of the right of suffrage at any election, is guilty of a misdemeanor.

Laws of 1842, ch. 130, tit. vii, § 4.

Betting  
upon elec-  
tions.

§ 62. Every person who makes, offers, or accepts any bet or wager upon the result of any election or upon the success or failure of any person or candidate, or upon the number of votes to be cast either in the aggregate, or for any particular candidate, or

upon the vote to be cast by any person or persons; or upon the decision to be made by any inspector, or canvasser, of any question arising in the course of an election, or upon any event whatever depending upon the conduct or result of an election, is guilty of a misdemeanor.

The words "person or candidate" are used in several sections of this chapter in order that it may be clear that the provisions embrace persons who may be voted for as officers to conduct an election—*e. g.*, the presiding officer of a town meeting—yet who are not candidates for the office to fill which the election is held.

**§ 63.** Every person who, being a candidate at any election, offers, or agrees to appoint or procure the appointment of any particular person or persons to office, as an inducement or consideration to any person to vote for, or procure or aid in procuring the election of such candidate, is guilty of misdemeanor.

Unlawful  
offers to  
procure  
offices for  
electors.

**§ 64.** Every person who, not being a candidate, communicates any offer made in violation of the last section, to any person, with intent to induce him to vote for or to procure or aid in procuring the election of the candidate making the offer, is guilty of misdemeanor.

Communic-  
ating such  
offer.

**§ 65.** Every person, who with intent to promote the election, either of himself or of any other person, or candidate, either

Furnishing  
money for  
elections,  
except for  
specified  
purposes.

1. Furnishes entertainment at his expense to any meeting of electors previous to or during an election;

2. Pays for, procures or engages to pay for any such entertainment;

3. Furnishes, or engages to pay or deliver any money or property, for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring attendance of voters at the polls: except for the conveyance of voters who are sick, poor, or infirm; or

4. Furnishes or engages to pay or deliver any money or property, for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions, and of printing and circulating ballots, handbills and other papers previous to such election, is guilty of misdemeanor.

See Laws of 1842, ch. 120, tit. vii, § 6. The commissioners have enlarged the existing rule, so far as to allow contributions for the expenses of public meetings as well as those of printing and circulating election documents. The same reasons which justify the second species of expenditure, sustain the first, and the existing rule is known to be stricter than can in practice be enforced.

**Defrauding  
an elector  
in his vote.**

§ 66. Every person who fraudulently alters the ballot of any elector, or substitutes one ballot for another, or furnishes any elector with a ballot containing more than the proper number of names, or who intentionally practices any fraud upon any elector to induce him to deposit a ballot as his vote and to have the same thrown out and not counted, or otherwise to defraud him of his vote, is guilty of misdemeanor.

Substantially the provision of Laws of 1842, ch. 130, tit. vii, §§ 7 and 8, but extended to embrace any fraud practised upon an elector whereby he is deprived of his vote.

**Obstructing  
electors at-  
tending  
elections.**

§ 67. Every person who willfully and without lawful authority obstructs, hinders, or delays any elector on his way to any poll where an election shall be held, is guilty of a misdemeanor.

See Laws of 1842, ch. 130, tit. vii, § 9.

**Voting  
more than  
once.**

§ 68. Every person who votes more than once at the same election, or who offers to vote after having once voted, either in the same or in another election district, is guilty of a misdemeanor.

See Laws of 1842, ch. 130, tit. vii, § 10. The language of that section is "who votes or offers to vote more than once," &c. This language is capable of being

taken in a sense which prohibits an innocent act. A person who offers his vote in the wrong election district, and being refused then goes to the right one and there offers his vote, may be said to have offered to vote more than once. The commissioners have substituted for the ambiguous expression, the phrase, "who offers to vote after having once voted."

**§ 69.** Every person who procures or counsels another to give or offer his vote at any election, knowing that such person is not qualified to vote at the place where such vote is given or offered, is guilty of a misdemeanor.

See Laws of 1842, ch. 130, tit. vii, § 11.

Procuring illegal votes.

**§ 70.** Every person who procures or counsels another to enter any town, ward, or election district for the purpose of giving his vote at an election, knowing that such person is not entitled so to vote, is guilty of a misdemeanor.

See Laws of 1842, ch. 130, tit. vii, § 12.

Importing voters who are unqualified.

**§ 71.** Every inhabitant of another state or country who, not being entitled to vote within this State, votes or offers to vote at an election in this State, is guilty of felony.

See Laws of 1842, ch. 130, tit. vii, § 13.

Illegal voting by inhabitant of another state.

**§ 72.** Every inhabitant of this State, who not being entitled to vote, knowingly votes or offers to vote at an election, is guilty of misdemeanor.

Illegal voting by inhabitant of this state.

Ib.

**§ 73.** Every person who, at any election, knowingly votes or offers to vote in any election district in which he does not reside, or in which he is not authorized by law to vote, is guilty of a misdemeanor.

Illegal voting by resident of different election district.

See Laws of 1842, ch. 130, tit. vii, § 10.

**§ 74.** Every person who having been convicted of any bribery or felony, thereafter offers to vote at any election, without having been pardoned and restored to all the rights of a citizen, is guilty of a misdemeanor.

Illegal voting by unpardoned convict.

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Compare *Const. of 1846*, art. 11, § 2; *Laws of 1847*, ch. 240, § 15; *Laws of 1842*, ch. 130, tit. i, § 3 and tit. iv, § 38.

As the definitions of "felony" and "infamous crime" are substantially the same (*2 Rev. Stat.*, 702, §§ 30, 31), the commissioners have employed the word "felony" instead of the phrase "infamous crime deemed by the laws of this State a felony," found in the act of 1842.

**Procuring  
name to be  
registered  
improperly.**

§ 75. Every person who causes his name to be registered as that of an elector, upon any registry of voters authorized by law to be kept in any town, city or election district of this State, knowing that he is not a qualified voter within the territorial limits covered by such registry, is punishable by imprisonment in a state prison not less than one year.

This section and that next following, are founded on *Laws of 1859*, ch. 380, § 14. The provisions of that act relate to New York city alone; but the rule is here generalized.

**Personat-  
ing qual-  
ified regis-  
tered voter.**

§ 76. Every person who, within any city, town or election district in this State in which a registry of qualified voters is by law authorized to be kept, falsely personates a registered voter, and in such personating offers to vote at any election, is punishable by imprisonment in a state prison not less than one year.

Ib.

**False state-  
ments upon  
applying for  
registry.**

§ 77. Every person who, at the time of requesting his name to be registered as that of a qualified voter, upon any registry of voters authorized by law to be kept in any city, town, or election district of this State, or at the time of offering his vote at any election, knowingly makes any false statement or employs any false representation or pretence or token, to procure his name to be registered or his vote to be received, is guilty of a misdemeanor.

See *Laws of 1859*, ch. 380, § 7.

**What is  
deemed a  
false state-  
ment.**

§ 78. A false statement, representation or token, made or used in the presence and to the knowledge of a person requesting his name to be registered or

offering his vote, is to be deemed made by himself, if it appears that it was made or used in support of his claim to be registered or to vote, that he knew it to be false, and suffered it to pass uncontradicted.

This section is new, but embodies familiar principles, and seems appropriate in order to give the preceding section its full application.

**§ 79. Every person who willfully disturbs or breaks up any public meeting of electors and others, lawfully being held for the purpose of considering public questions, is guilty of a misdemeanor.**

Disturbance of public meetings.

**§ 80. Every person who, by threats, intimidations, or unlawful violence willfully hinders or prevents electors from assembling in public meeting for the consideration of public questions, is guilty of a misdemeanor.**

Preventing public meetings.

**§ 81. Every person who makes use of any force or violence, or of any threat to do any unlawful act, as a means of preventing an elector from attending any public meeting lawfully held for the purpose of considering any public questions, is guilty of a misdemeanor.**

Preventing electors from attending public meetings.

**§ 82. Every person who willfully, by unlawful arrest, by force and violence, or by threats or intimidations, prevents an elector from voting at an election, or employs either of such means to hinder him from voting or to cause him to vote for any person or candidate, is guilty of a misdemeanor.**

Preventing electors from voting.

**§ 83. Every person who willfully disobeys a lawful command of an inspector or board of inspectors, given in the execution of their duty as such, at an election, is guilty of a misdemeanor.**

Disobedience to lawful commands of inspectors.

See *Laws of 1842*, ch. 130, tit. vii, § 9.

**§ 84. Every person who is guilty of any riotous conduct, or who causes any disturbance or breach of**

Riotous conduct or violence

which impedes elections.

the peace, or uses any disorderly violence, or threats of violence whereby any election is impeded or hindered, or whereby the lawful proceedings of the inspectors or canvassers at such election, in the discharge of their duty, are interfered with, is guilty of a misdemeanor.

Summary arrest therefor.

§ 85. Whenever at an election any person refuses to obey the lawful command of the inspectors, or by any disorderly conduct in their presence interrupts or disturbs their proceedings, they may make an order directing the sheriff or any constable of the county, or policeman of the town or city, to take the person so offending into custody, and detain him until the final canvass of the votes shall be completed. But such order shall not prohibit the person taken into custody from voting at the election.

See *Laws of 1842*, ch. 130, tit. vii, § 33.

Such arrest no bar to a subsequent prosecution.

§ 86. The fact that any person, offending against the provisions of the preceding section, was taken into custody and detained, as therein authorized, forms no defense to a prosecution for the offense committed, under any provisions of this Code.

Intended to prevent the possible question, whether the rule that no person shall be twice punished for the same offense should apply in the case contemplated.

Destroying ballots, or ballot boxes.

§ 87. Every person who willfully breaks or destroys, on the day of any election, or before the canvass is completed, any ballot-box used or intended to be used at such election, or defaces, injures, destroys or conceals, any ballot which has been deposited in any ballot-box at an election, and has not already been counted, or canvassed, or any poll list used or intended to be used at such election, is guilty of felony.

Keeping false poll lists.

§ 88. Every clerk of the poll at any election, who willfully keeps a false poll list, or knowingly inserts in his poll list any false statement, is guilty of a misdemeanor.

§ 89. Every inspector of an election who willfully excludes any vote duly tendered, knowing that the person offering the same is lawfully entitled to vote at such election, or who willfully receives a vote from any person who has been duly challenged, in relation to his right to vote at such election, without exacting from such person such oath or other proof of qualification as may be required by law, or who willfully omits to challenge any person offering to vote whom he knows or suspects not to be duly entitled to vote, and who has not been challenged by any other person is guilty of a misdemeanor.

Misconduct  
of inspec-  
tors.

§ 90. Every inspector of any election, member of any board of canvassers, messenger or other officer authorized to take part in or perform any duty in relation to any canvass or official statement of the votes cast at any election, who willfully makes any false canvass of such votes, or makes, signs, publishes or delivers any false return of such election, or any false certificate of the result of such election, knowing the same to be false, or willfully defaces, destroys or conceals any statement or certificate entrusted to his care, is guilty of a misdemeanor.

Falsely can-  
vassing  
votes, or  
certifying  
result of  
election.

§ 91. The word "election," as used in this chapter, designates only elections had within this state for the purpose of enabling electors, as such, to choose some public officer or officers under the laws of this state or of the United States.

Election  
defined.

§ 92. Irregularities or defects in the mode of noticing, convening, holding or conducting an election authorized by law, form no defense to a prosecution for a violation of the provisions of this chapter.

Irregulari-  
ties in elec-  
tions no de-  
fense for  
violations  
of this  
chapter.

Decisions in other states raise the question whether the invalidity of an election is an answer to a prosecution for illegally voting at it. For cases in the affirmative, see *State v. Williams*, 25 *Me.*, 561; *Commonwealth v. Gibbs*, 4 *Dall.*, 253: in the negative, *State v. Bailey*, 21 *Me.*, 62; *Commonwealth v. Shaw*, 7 *Metc.*, 52; *People v. Cook*, 8 *N. Y.* (4 *Seld.*), 67. The Commissioners recommend the rule in the text as clearly consonant with justice.

Rights of persons lawfully interfering in elections declared.

§ 93. But nothing in this chapter shall be construed to authorize the punishment of any persons who, by authority of law, may interfere to prevent or regulate an election which has been unlawfully noticed or convened, or is being, or is about to be, unlawfully conducted.

Submission of questions to the people.

§ 94. Every act which by the provisions of this chapter is made criminal when committed with reference to the election of a candidate, is equally criminal when committed with reference to the determination of a question submitted to electors to be decided by votes cast at an election.

Good faith in offering to vote, a defense for alleged illegal voting.

§ 95. Upon any prosecution for procuring, offering or casting an illegal vote, the accused may give in evidence any facts tending to show that he honestly believed upon good reason that the vote complained of was a lawful one; and the jury may take such facts into consideration in determining whether the acts complained of, were knowingly done or not.

This section is intended to enable juries, upon proper proof, to relax in this class of cases, the strict rule that ignorance of the law is no excuse. It has been held that while an elector who votes in ignorance of facts which disqualify him, is not liable to punishment, one who votes with a knowledge of such facts is not excused though he voted in an honest belief that he was entitled to do so. (*McGuire v. State*, 7 *Humph.*, 54; *State v. Boyett*, 10 *Ired.*, 336.) Whether upon given facts a right to vote exists, is frequently a legal question of such difficulty that one claiming it in good faith, though erroneously, ought to be exempt from punishment. See *Commonwealth v. Aglar, Thatcher's Crim. Cas.*, 412; *Same v. Wallace, Id.*, 592; *Same v. Bradford*, 9 *Metc.*, 268; in support of the rule embodied in the text.

## TITLE VI.

OF CRIMES BY AND AGAINST THE EXECUTIVE POWER  
OF THE STATE.

- SECTION 96.** Acting in a public office without having qualified.  
 97. Acts of officer *de facto*, not affected.  
 98. Giving or offering bribes.  
 99. Asking or receiving bribes.  
 100. Attempting to prevent officers from performing duty.  
 101. Resisting officers.  
 102. Taking excessive fees.  
 103. Taking reward for omitting or delaying official acts.  
 104. Taking fees for services not rendered.  
 105. Taking unlawful reward for services in extradition of fugitives.  
 106. Buying appointments to office.  
 107. Selling appointments to office.  
 108. Taking rewards for deputation.  
 109. Unlawful grant or deputation void, except as to official acts done before conviction.  
 110. Exercising functions of office, after successor has qualified.  
 111. Refusal to surrender books, &c., of office to successor upon demand.  
 112. Administrative officers.

§ 96. Every person who executes any of the functions of a public office without having taken and duly filed the required oath of office, or without having executed and duly filed the required security, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits his right to the office.

Acting in a public office without having qualified.

Corresponds with *Rep. Pol. Code*, § 222.

§ 97. The last section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

Acts of officer *de facto*, not affected.

§ 98. Every person who gives or offers any bribe to any executive officer of this State with intent to influence him in respect to any act, decision, vote, opinion,

Giving or offering bribes.

or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both.

*2 Rev. Stat., 682, § 9; Laws of 1853, ch. 539, § 1.*

Asking or receiving bribes.

§ 99. Every executive officer or person elected or appointed to an executive office who asks, receives or agrees to receive any bribe upon any agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both ; and in addition thereto forfeits his office and is forever disqualified from holding any public office under this State.

Substantially the provisions of *2 Rev. Stat., 683, § 10*, as amended; *Laws of 1853, ch. 539, § 1*; but extended to embrace asking a bribe.

Attempting to prevent officers from performing duty.

§ 100. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, is guilty of a misdemeanor.

Resisting officers.

§ 101. Every person who knowingly resists, by the use of force or violence, any executive officer, in the performance of his duty, is guilty of a misdemeanor.

Taking excessive fees.

§ 102. Every executive officer who asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

*See 2 Rev. Stat., 650, § 5.*

Taking reward for omitting or delaying official acts.

§ 103. Every executive officer who asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, is guilty of a misdemeanor.

**§ 104.** Every executive officer who asks or receives any fee or compensation for any official service which has not been actually rendered, except in cases of charges for prospective costs, or of fees demandable in advance in the cases allowed by law, is guilty of a misdemeanor. \*

Taking fees  
for services  
not ren-  
dered.

**§ 105.** Every officer of this State who asks or receives any compensation, fee or reward of any kind for any service rendered or expense incurred in procuring from the Governor of this State a demand upon the executive authority of a state or territory of the United States, or of a foreign government, for the surrender of a fugitive from justice; or of any service rendered or expense incurred in procuring the surrender of such fugitive, or of conveying him to this State or for detaining him therein, except upon an employment by the Governor of this State, and upon an account duly audited and paid out of the State treasury, is guilty of a misdemeanor.

Taking  
unlawful  
reward for  
services in  
extradition  
of fugitives.

This section is suggested to supersede the provisions of *Rep. Code Cr. Pro.*, §§ 907, 908.

**§ 106.** Every person who gives or agrees, or offers to give any gratuity or reward in consideration that himself or any other person shall be appointed to any public office, or shall be permitted to, or to exercise, perform or discharge the prerogatives or duties of any office, is punishable by imprisonment in the county jail not less than six months nor more than two years, or by a fine of not less than two hundred dollars or more than one thousand dollars, or both.

Buying ap-  
pointments  
to office.

*2 Rev. Stat.*, 696, § 32, as amended, *Laws of 1863*, ch. 51, § 1.

**§ 107.** Every person who, directly or indirectly, asks or receives or promises to receive any gratuity or reward or any promise of a gratuity or reward, for appointing another person or procuring for another person an appointment to any public office or any

Selling ap-  
pointments  
to office.

clerkship, deputation or other subordinate position in any public office, is punishable by imprisonment in the county jail not less than six months nor more than two years, or by a fine of not less than two hundred dollars nor more than one thousand dollars, or both. \*

2 Rev. Stat., 696, § 35, as amended, *Laws of 1863*, ch. 61, § 1.

Taking rewards for deputation.

§ 108. Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise, perform or discharge any of the prerogatives or duties of his office, is punishable by imprisonment in the county jail not less than six months nor more than two years, and by a fine of not less than two hundred dollars or more than one thousand dollars; and in addition thereto he forfeits his office.

2 Rev. Stat., 696, § 35, as amended, *Laws of 1863*, ch. 51.

Unlawful grant or deputation void, except as to official acts done before conviction.

§ 109. Every grant or deputation made contrary to the provisions of the two preceding sections is void; but official acts done before a conviction for any offense prohibited by those sections, shall not be deemed invalid, in consequence of the invalidity of such grant or deputation.

Founded on 2 Rev. Stat., 696, § 37.

Exercising functions of office, after successor has qualified.

§ 110. Every person who, having been an executive officer, willfully exercises any of the functions of his office after his term of office has expired and a successor has been duly elected or appointed, and has qualified, in his place, and he has notice thereof, is guilty of a misdemeanor.

Refusal to surrender books, &c., of office to surrender upon demand.

§ 111. Every person who, having been an executive officer of this State, wrongfully refuses to surrender the official seal or any of the books and papers appertaining to his office, to his successor who has been duly elected or appointed, and has duly qualified, and

has demanded the surrender of the books and papers of such office, is guilty of a misdemeanor.

§ 112. The various provisions of this chapter which relate to executive officers apply in relation to administrative officers in the same manner as if administrative and executive officers were both mentioned together.

Administrative officers.

## TITLE VII.

### OF CRIMES AGAINST THE LEGISLATIVE POWER.

SECTION 113. Preventing the meeting or organization of either branch of the legislature.

- 114. Disturbing the legislature while in session.
- 115. Compelling adjournment.
- 116. Intimidating a member of the legislature.
- 117. Compelling either house to perform or omit any official act.
- 118. Altering draft of bill.
- 119. Altering engrossed copy.
- 120. Giving bribes to members of the legislature.
- 121. Receiving bribes by members of legislature.
- 122. Witnesses refusing to attend before the legislature or legislative committees.
- 123. Refusing to testify.
- 124. Members of the legislature liable to forfeiture of office.

§ 113. Every person who willfully and by force or fraud prevents the legislature of this State, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or both.

Preventing the meeting or organization of either branch of the legislature.

See *Liv. Cr. Code*, 381, § 118.

§ 114. Every person who willfully disturbs the legislature of this State, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence

Disturbing the legislature while in session.

of either house of the legislature, tending to interrupt its proceedings or impair the respect due to its authority, is guilty of a misdemeanor.

**Compelling adjournment.**

§ 115. Every person who willfully and by force or fraud compels or attempts to compel the legislature of this State, or either of the houses composing it, to adjourn or disperse, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by fine of not less than five hundred dollars, nor more than two thousand dollars, or both.

*Liv. Cr. Code, 381, § 118.*

**Intimidating a member of the legislature.**

§ 116. Every person who willfully, by intimidation or otherwise, prevents any member of the legislature of this State, from attending any session of the house of which he is a member, or of any committee thereof, or from giving his vote upon any question which may come before such house, or from performing any other official act, is guilty of a misdemeanor.

Ib.

**Compelling either house to perform or omit any official act.**

§ 117. Every person who willfully compels or attempts to compel either of the houses composing the legislature of this State to pass, amend, or reject any bill, or resolution, or to grant or refuse any petition, or to perform or omit to perform any other official act, is punishable by imprisonment in a state prison not less than five nor more than ten years, or by a fine of not less than five hundred dollars nor more than two thousand dollars, or both.

Ib.

**Altering draft of bill.**

§ 118. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

§ 119. Every person who fraudulently alters the engrossed copy or enrollment of any bill which has been passed by the legislature of this State, with intent to procure it to be approved by the governor or certified by the secretary of State, or printed or published by the printer of the Statutes in language different from that in which it was passed by the legislature, is guilty of felony.

Altering  
engrossed  
copy.

§ 120. Every person who gives or offers to give a bribe to any member of the legislature, or attempts directly, or indirectly, by menace, deceit, suppression of truth or any other corrupt means to influence a member in giving or withholding his vote, or in not attending the house of which he is a member, or any committee thereof, is punishable by imprisonment in a state prison not exceeding ten years or by fine not exceeding five thousand dollars, or both.

Giving  
bribes to  
members of  
the legisla-  
ture.

§ 121. Every member of either of the houses composing the legislature of this State, who asks, receives, or agrees to receive any bribe upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or who gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in a state prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both.

Receiving  
bribes by  
members of  
the legisla-  
ture.

This section, with the one which precedes, is founded upon the provisions of 2 Rev. Stat., 682, § 9, as amended by *Laws of 1853, ch. 539, § 2*. It is extended, however, to embrace what is known as "log rolling," or agreements to exchange votes for or against measures pending before the legislature; and, also, so as to embrace deceits and concealments practised upon members of the legislature to obtain their votes.

## THE PENAL CODE

In *Marshall v. Baltimore & Ohio R. R. Co.*, 16 *How. (U. S.) R.*, 314, the court (commenting upon the cases of *Fuller v. Damo*, 18 *Pick.*, 470; *Hatzfield v. Gulden*, 7 *Watts*, 152; *Clippinger v. Hepbaugh*, 5 *Watts & S.*, 315; *Wood v. McCan*, 6 *Dana*, 366; *Hunt v. Test*, 8 *Ala.* 719; *The Commonwealth v. Callaghan*, 2 *Va. Cas.*, 460), say: "The sum of these cases is, 1. All contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators are void by the policy of the law.

2. Secrecy as to the character under which the agent or solicitor acts tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.

3. That what, in the technical vocabulary of politicians, is termed "log rolling" is a misdemeanor at common law, punishable by indictment.

Witnesses refusing to attend before the legislature or legislative committee.

**§ 122.** Every person who, being duly summoned to attend as a witness before either house of the legislature or any committee thereof, authorized to summon witnesses, refuses or neglects without lawful excuse to attend pursuant to such summons, is guilty of a misdemeanor.

Refusing to testify.

**§ 123.** Every person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, willfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

Members of the legislature liable to forfeiture of office.

**§ 124.** The conviction of a member of the legislature of either of the crimes defined in this chapter, involves as a consequence in addition to the punishment prescribed by this Code, a forfeiture of his office; and disqualifies him from ever afterwards holding any office under this State.

## TITLE VIII.

## OF CRIMES AGAINST PUBLIC JUSTICE.

## CHAPTER I.

## BRIBERY AND CORRUPTION.

- SECTION 125.** Giving bribes to judges, jurors, referees, &c.
- 126. Receiving bribes by judicial officers,
  - 127. Receiving bribes by jurors, referees, &c.
  - 128. Misconduct by jurors, arbitrators and referees.
  - 129. Judicial officers, jurors, referees, &c., accepting gifts from parties.
  - 130. "Gifts" defined.
  - 131. Improper attempts to influence jurors, referees or arbitrators.
  - 132. Drawing jurors fraudulently.
  - 133. Misconduct by officers having charge of juries.

§ 125. Every person who gives or offers to give a bribe, to any judicial officer, juror, referee, arbitrator, umpire or assessor, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both.

Giving  
bribes to  
judges,  
jurors,  
referees,  
&c.

§ 126. Every judicial officer of this State who asks, receives, or agrees to receive any bribe upon any agreement or understanding that his vote, opinion or decision upon any matter or question which is or may be brought before him for decision shall be thereby influenced, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars or both; and in addition thereto forfeits his office and is forever disqualified from holding any public office under this State.

Receiving  
bribes by  
judicial  
officers.

This section, with the preceding, is founded upon 2 Rev. Stat., 683, § 10, as amended, *Laws of 1853*, ch. 539.

**Receiving  
bribes by  
jurors,  
referees,  
&c.**

§ 127. Every juror, referee, arbitrator, umpire or assessor, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive any bribe upon any agreement or understanding that his vote, opinion or decision, upon any matter or question which is or may be brought before him for decision shall be thereby influenced, is guilty of felony.

**Misconduct  
by jurors,  
arbitrators  
and referees.**

§ 128. Every juror, or person drawn or summoned as a juror, or chosen arbitrator, or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give a verdict for or against any party ; or,
2. Willfully permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause pending before him except according to the regular course of proceeding upon the trial of such cause,

Is guilty of a misdemeanor.

**Judicial  
officer,  
juror,  
referee, &c.,  
accepting  
gifts from  
parties.**

§ 129. Every judicial officer, juror, referee, arbitrator or umpire, who accepts any gift from any person, knowing him to be a party in interest or the attorney or counsel of any party in interest to any action or proceeding then pending or about to be brought before him, is guilty of a misdemeanor.

**"Gift."  
defined.**

§ 130. The word "gift" in the foregoing section shall not be taken to include property received by inheritance, by will, or by gift in view of death.

**Improper  
attempts to  
influence  
jurors,  
referees or  
arbitrators.**

§ 131. Every person who attempts to influence a juror, or any person summoned or drawn as a juror, or chosen an arbitrator or appointed a referee, in respect to his verdict, or decision of any cause or matter pending or about to be brought before him, either:

1. By means of any communication oral or written had with him, except in the regular course of proceedings upon the trial of the cause :

2. By means of any book, paper, or instrument exhibited otherwise than in the regular course of proceedings upon the trial of the cause;
3. By means of any threat or intimidation;
4. By means of any assurance or promise of any pecuniary or other advantage; or,
5. By publishing any statement, argument, or observation relating to the cause,

**Is guilty of a misdemeanor.**

The existing statute declares every person who shall attempt "improperly" to influence a juror, guilty of a misdemeanor (*2 Rev. Stat.*, 693, § 16), but leaves the question, what attempts are improper, to judicial construction. The commissioners deem it desirable that the Code should specify with greater precision the acts intended to be forbidden.

**§ 132.** Every person authorized by law to assist at the drawing of any jurors to attend any court, who willfully puts or consents to the putting upon any list of jurors as having been drawn, any name which shall not have been drawn for that purpose in the manner prescribed by law; or, who omits to place on such list any name that shall have been drawn in the manner prescribed by law; or, who signs or certifies any list of jurors as having been drawn which was not drawn according to law; or, who is guilty of any other unfair, partial, or improper conduct in the drawing of any such list of jurors, is guilty of a misdemeanor.

Drawing  
jurors frau-  
dulently.

**§ 133.** Every officer to whose charge any juror is committed by any court or magistrate, who negligently or willfully permits them, or any one of them, either:

Misconduct  
by officer  
having  
charge of  
juries.

1. To receive any communication from any person;
2. To make any communication to any person;
3. To obtain or receive any book or paper, or refreshment; or,
4. To leave the jury room without the leave of such court, or magistrate first obtained,

**Is guilty of a misdemeanor.**

## CHAPTER II.

## OF RESCUES.

## SECTION 134. Rescuing prisoners.

135. Retaking goods from custody of officer.

*Rescuing  
prisoners.*

§ 134. Every person who by force or fraud rescues or attempts to rescue, or aids another person in rescuing or in attempting to rescue any prisoner from any officer or other person having him in lawful custody, is punishable as follows :

1. If such prisoner was in custody upon a charge or conviction of felony, by imprisonment in a state prison for not less than ten years ;
2. If such prisoner was in custody otherwise than upon a charge or conviction of felony, by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

*Retaking  
goods from  
custody of  
officer.*

§ 135. Every person who willfully injures or destroys, or takes or attempts to take, or assists any other person in taking or attempting to take from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

## CHAPTER III.

## OF ESCAPES, AND AIDING THEREIN.

## SECTION 136. Re-arrest of escaped prisoners.

- 137. Escape from state prison.
- 138. Attempt to escape from state prison.
- 139. Escape from other than state prison.
- 140. Attempt to escape from other than state prison.
- 141. Assisting prisoner to escape from prison.
- 142. Carrying into prison things useful to aid an escape.
- 143. Concealing escaped prisoner.
- 144. Assisting prisoner to escape from officer.

SECTION 145. "Prison" defined.  
146. "Prisoner" defined.

§ 136. Every prisoner confined upon conviction for a criminal offense, who escapes from prison, may be pursued, retaken and imprisoned again notwithstanding the term for which he was sentenced to be imprisoned may have expired at the time when he is retaken and he shall remain so imprisoned, until tried for such escape, or discharged on a failure to prosecute therefor.

Re-arrest of  
escaped  
prisoner.

*2 Rev. Stat., 685, § 20.*

§ 137. Every prisoner confined in a state prison for a term less than for life, who by force or fraud escapes therefrom, is punishable by imprisonment in such prison for a term not exceeding five years, to commence from the expiration of the original term of his imprisonment.

Escape  
from state  
prison.

*Compare 2 Rev. Stat., 685, § 21.*

§ 138. Every prisoner confined in a state prison for a term less than for life, who attempts by force or fraud, although unsuccessfully, to escape from such prison, is guilty of felony.

Attempt to  
escape from  
state  
prison.

*Compare 2 Rev. Stat., 685, § 23.*

§ 139. Every prisoner confined in any other prison than a state prison, who by force or fraud escapes therefrom, is punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding one year, to commence from the expiration of the original term of his imprisonment.

Escape  
from other  
than state  
prison.

*Compare 2 Rev. Stat., 685, § 22.*

§ 140. Every prisoner confined in any other prison than a state prison, who attempts by force or fraud, although unsuccessfully, to escape therefrom, is punishable by imprisonment in a county jail not exceeding one year, to commence from the expiration of the original term of his imprisonment.

Attempt to  
escape from  
other than  
state  
prison.

*Compare 2 Rev. Stat., 685, § 24.*

**Assisting  
prisoner to  
escape from  
prison.**

§ 141. Every person who willfully, by any means whatever, assists any prisoner confined in any prison to escape therefrom, is punishable as follows :

1. If such prisoner was confined upon a charge or conviction of felony, by imprisonment in a state prison not exceeding ten years ;

2. If such prisoner was confined otherwise than upon a charge or conviction of felony, by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both.

**Carrying  
into prison,  
things use-  
ful to aid an  
escape.**

§ 142. Every person who carries or sends into any prison, anything useful to aid any prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as follows :

1. If such prisoner was confined upon any charge or conviction of felony, by imprisonment in a state prison not exceeding ten years ;

2. If such prisoner was confined otherwise than upon a charge or conviction of felony, by imprisonment in a county jail not exceeding one year, or by a fine of five hundred dollars, or both.

**Concealing  
escaped pri-  
soner.**

§ 143. Every person who knowingly and willfully conceals any prisoner, who, having been confined in prison upon a charge or conviction of misdemeanor, has escaped therefrom, is guilty of misdemeanor.

**Assisting  
prisoner to  
escape from  
officer.**

§ 144. Every person who willfully assists any prisoner in escaping or attempting to escape from the custody of any officer or person having the lawful charge of such prisoner under any process of law or under any lawful arrest, is guilty of a misdemeanor.

**"Prison."  
defined.**

§ 145. The term "prison" in this chapter includes state prisons, county jails and every place designated by law for the keeping of persons held in custody under process of law, or under any lawful arrest.

§ 146. The term "prisoner" in this chapter includes every person held in custody under process of law issued from a court of competent jurisdiction whether civil or criminal, or under any lawful arrest. "Prisoner" defined.

## CHAPTER IV.

### FORGING, STEALING, MUTILATING AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS.

SECTION 147. Larceny, destruction, &c., of records by officers having them in custody.

148. Larceny, destruction, &c., of records by other persons.

149. Offering false or forged instruments to be filed or recorded.

§ 147. Every clerk, register or other officer having the custody of any record, map or book, or of any paper or proceeding of any court of justice filed or deposited in any public office, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying or fraudulently removing or secreting such record, map, book, paper or proceeding, or who permits any other person so to do, is punishable by imprisonment in a state prison not exceeding five years, and in addition thereto forfeits his office. Larceny, destruction, &c., of records by officers having them in custody.

Founded upon 2 Rev. Stat., 680, § 70.

§ 148. Every person not an officer such as is mentioned in the last section, who is guilty of any of the acts specified in that section is punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. Larceny, destruction, &c., of records, by other persons.

See 2 Rev. Stat., 680, § 69.

§ 149. Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this State, which instrument, if genuine, might be filed or registered or recorded under any law of this State or of the United States is guilty of felony. Offering false or forged instruments to be filed or recorded.

## CHAPTER V.

## PERJURY AND SUBORNATION OF PERJURY.

## SECTION 150. Perjury defined.

- 151. "Oath" defined.
- 152. Oath of office.
- 153. Irregularities in the mode of administering oaths.
- 154. Incompetency of witness no defense for perjury.
- 155. Witness' knowledge of materiality of his testimony not necessary.
- 156. Making of deposition, &c., when deemed complete.
- 157. Statement of that which one does not know to be true.
- 158. Punishment of perjury.
- 159. Summary committal of witnesses who have committed perjury.
- 160. Witnesses necessary to prove the perjury, may be bound over to appear.
- 161. Documents necessary to prove such perjury may be detained.
- 162. Subornation of perjury defined.
- 163. Punishment of subornation.
- 164. Convict of perjury declared incompetent as a witness.

Perjury defined.

§ 150. Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states any material matter which he knows to be false, is guilty of perjury.

*Proposed modification of the law.*—The definition of perjury given in the Revised Statutes, was as follows:

"Every person who shall willfully and corruptly swear, testify, or affirm falsely, to any material matter, upon any oath, affirmation or declaration, legally administered:

"1. In any matter, cause or proceeding depending in any court of law or equity, or before any officer thereof;

"2. In any case where an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice;

"3. In any matter or proceeding before any tribunal or officer created by the constitution or by law, or where any oath may be lawfully required by any judicial, executive or administrative officer."

"Shall upon conviction be adjudged guilty of perjury," &c., 2 *Rev. Stat.*, 681, § 1.

This was a considerable extension of the common law definition, which embraced only cases in which the false testimony was given in a judicial proceeding. But the enlarged definition given by the Revised Statutes appears to have been overlooked by subsequent legislatures. For a practice has grown up of making express provision in statutes authorizing any new mode of investigation or inquiry, that false testimony given under the statute shall be perjury.

The following are the leading instances of such provisions:

*Laws of 1829*, ch. 368, § 9. This act authorizes the canal board to subpoena witnesses to be examined before them when the interests of the State require it; and section 9 declares willful false swearing before the board to be perjury.

*Laws of 1834*, ch. 201, § 7. The act authorizes an examination to be instituted by the superintendent of the Onondaga salt springs; and the section cited declares false swearing upon such examination to be perjury.

In the later act concerning the salt springs (*Laws of 1859*, ch. 346), an examination is authorized as in the act of 1834, ch. 201; but the unnecessary provision declaring false swearing perjury, is omitted.

*Laws of 1837*, ch. 150, § 42. This statute relates to the powers and duties of the commissioners for loaning United States moneys, and directs the manner in which they shall execute their trust. The section cited prescribes that "if any person shall falsely swear or affirm in any of the cases where an oath or affirmation is required to be taken by this act, or shall willfully and knowingly act contrary to any oath or affirmation he has taken in pursuance of this act, such offense shall be deemed to be perjury."

*Laws of 1837*, ch. 430, § 8, declares a party to the record who swears falsely upon the examination authorized by the usury act, guilty of perjury.

*Laws of 1842*, ch. 130, tit. VII, § 1. This is the statute regulating elections. After providing that when any person offering to vote is challenged, the inspectors shall tender to him an oath to answer fully and truly, and shall then put certain questions—the act declares false swearing on such examination to be perjury.

*Laws of 1839*, ch. 389, § 1 (repealed by the act of 1842 above cited), had a provision of the same purport.

*Laws of 1843*, ch. 57, § 4; *Laws of 1855*, ch. 20, § 4. These acts authorize chairmen of committees of common councils, &c., to administer oaths to witnesses brought before such committee; and declare any false swearing in testimony so taken, to be perjury.

*Laws of 1849*, ch. 115, § 19. This statute makes it the

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duty of clerks of Erie county to render periodical accounts of official fees and disbursements, the correctness of which must be verified by affidavit. Section 19 declares every person who shall willfully swear falsely in verifying any such account, guilty of perjury.

*Laws of 1854, ch. 332, § 8.* This declares willful false swearing to any oath or affidavit which may be lawfully required by any rules and regulations of certain canal officers, to be perjury.

*Laws of 1854, ch. 398, tit. III, § 3.* This act provided for an enrollment of the militia; and authorized any person who claimed exemption from duty to file an affidavit of the facts, as the basis of an examination of his claim, to be made by assessors; and the section cited declares that to swear falsely in such affidavit is perjury.

*Laws of 1859, ch. 44, tit. IV, § 6.* This section authorizes the trustees of the village of Monrovia to examine, on oath, any property owner claiming a reduction of taxes; and declares willful false swearing on such examination to be perjury.

*Laws of 1859, ch. 380, §§ 13, 14.* This is the registry act for the city of New York. It authorizes certain questions to be put to electors, under oath, by inspectors of election and by the board of registration. The sections cited declare false swearing perjury.

*Laws of 1859, ch. 470, § 7.* This statute provides for the sale of certain lands belonging to the State, and directs officers therein named to file reports verified by affidavit. Section 7 makes all false swearing under any of the provisions of the act perjury.

*Laws of 1860, ch. 259, § 25.* The statute is amendatory of the Metropolitan Police Commissioners' act. The twenty-fifth section, after empowering the board of Metropolitan Police Commissioners to subpoena witnesses, &c., declares false swearing by a witness, upon any necessary proceeding under the regulations established by the commissioners, perjury.

*Laws of 1860, ch. 465, § 4,* declares witnesses testifying falsely before the commissioners appointed to ascertain and collect the damages caused by destruction of property at Quarantine grounds on Staten Island, in Sept., 1858, guilty of perjury.

*Laws of 1863, ch. 90, § 15.* The act, which is for the protection and improvement of the Tonawanda band of Seneca Indians, authorizes oaths to be administered for several purposes; and provides in section 15 that willful false swearing by any person to whom any oath may be administered, according to the act, shall be deemed perjury.

It is obvious that by force of the definition of perjury contained in the Revised Statutes, false swearing upon the examination or proceeding authorized by either of the

above-mentioned statutes would have been punished as perjury, without any express provision to that effect in the statute authorizing the proceeding. Yet, either from a want of clearness in the general definition, or from the fact that under the Revised Statutes there still remained cases in which false swearing was not perjury — *e. g.*, the case of mere voluntary oaths. (See *People v. Travis*, 1 *Park. Cr.*, 213, where it is held that perjury cannot be assigned of a false oath to a protest taken before a notary public as part of the preliminary proofs of loss under a policy of marine insurance.) The penalty of perjury has been declared again and again; of course giving rise to a question in respect to similar statutes in which the express declaration may be omitted, whether perjury can be alleged of a violation of the statute oath. To simplify the existing law and expunge from the statute book these multiplied provisions covering so nearly the same ground, the commissioners propose, by a subsequent section (inserted in the chapter entitled "of other offenses against public justice," to declare it a misdemeanor to administer or to take any oath except in the cases there specified. And they propose by the sections in the text to extend the penalties of perjury to violation of all judicial oaths *authorized* by law, as well as to violations of oaths *required*.

"*Testify, declare, depose or certify.*" It is not intended to confine the definition of perjury to testimony and depositions, properly so called: on the contrary, it is the intention of the commissioners to frame a section which shall embrace every class of statement which, by law, may be attested by an oath applying to the particular statement in distinction from the general oath taken by public officers. Nearly every mode of oral statement under oath is embraced by the term "testify;" and nearly every written one in the term "depose." But as doubts may arise as to the full extension of these terms, in peculiar cases the commissioners have added "declare" and "certify," in order that all modes of statement may be clearly included.

**§ 151.** The term "oath," as used in the last section, <sup>"Oath"</sup> <sub>defined.</sub> includes an affirmation, and every other mode of attesting the truth of that which is stated, which is authorized by law.

The modes of administering oaths and affirmations in various cases, are prescribed by *Rep. Code Civ. Pro.*, §§ 1873, 1878.

**§ 152.** So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the previous sections. <sup>Oath of office.</sup>

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The definition of perjury cannot properly include the violation of an oath of office by misconduct in the office. The official oath serves a valuable purpose in giving point and depth to the sense of the public duty which every person entrusted with the discharge of official responsibilities owes to the community. But it cannot be a convenient mode of punishing official misconduct to treat it as involving a breach of the oath of office, punishable as perjury. The act which violates the official duty should be declared criminal, and the punishment should be affixed to the act itself. The case covered by the provisions of 1 Rev. Stat., 199, 200, §§ 14, 15, which direct that certain surveyors shall take and file the oath required by the constitution—*i. e.*, an oath that they will faithfully discharge the duties of the office—and declare that in case any surveyor shall willfully and knowingly make a false return of the survey by him made, &c., he shall be deemed guilty of perjury—is treated by the commissioners upon this principle. It may be truly said that making a false return is a violation of the duties of the office, and so is a breach of the official oath, yet the commissioners do not extend the penalty of perjury to a false report made in violation of an official oath merely; but reserve that species of offense to be covered by a section declaring it a misdemeanor for any official surveyor to make a report knowing it to be false.

Irregularities in the mode of administering oaths.

§ 153. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

Two classes of cases are important to be considered one class is, where an oath is administered in an irregular manner, but the person taking it supposes at the time that all the formalities of law are being complied with. Such were the circumstances in *People v. Cook* (4 Seld., 67), where challenged voters were sworn upon a copy of Watts' Psalms and Hymns; the book being supposed to be the Bible. As to these cases, the decision in *People v. Cook* is, that the oath is valid, and the party is as amenable to the consequences of perjury as if it had been administered in strict conformity to the statute. Another class of cases is, where the person taking the oath evades some formality of the oath with intent to escape its obligation; as where he kisses his thumb instead of the book. In these cases his fraud should not be permitted to secure him against punishment. The section in the text therefore prescribes the same rule for both classes.

**§ 154.** It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he actually was received to give such testimony or make such deposition or certificate.

Incompetency of witness no defense for perjury.

See *Van Steenberg v. Kortz*, 10 *Johns.*, 167.

**§ 155.** It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him ; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

Witness' knowledge of materiality of his testimony not necessary.

**§ 156.** The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person with intent that it be uttered or published as true.

Making of deposition, &c., when deemed complete.

**§ 157.** An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

Statement of that which one does not know to be true.

See, in support of the rule prescribed in this section, *People v. McKinney*, 3 *Park. Cr.*, 511; *Bennett v. Judson*, 21 *N. Y.*, 238; *Commonwealth v. Cornish*, 6 *Binn.*, 249; *Steinman v. McWilliams*, 6 *Penn. St.*, 170; and, opposed to it, *United States v. Shellmire*, *Baldw.*, 370.

**§ 158.** Perjury is punishable by imprisonment in a state prison as follows :

Punishment of perjury.

1. When committed on the trial of an indictment for felony, by imprisonment not less than ten years;
2. When committed on any other trial or proceeding in a court of justice, by imprisonment for not more than ten years;
3. In all other cases by imprisonment not more than five years.

2 *Rev. Stat.*, 681, § 2, modified. The section of the Revised Statutes cited, prescribed imprisonment for not less than ten years as the punishment for perjury com-

mitted on the trial of an indictment for felony, and imprisonment for not *more* than ten years for perjury committed in any other case. As the commissioners have reported a definition of perjury which may embrace some cases of false swearing which were not punishable under the definition given in the Revised Statutes; they have thought it proper to restrict the punishment which may be inflicted for the new offenses, within somewhat narrower limits. They, therefore, prescribe imprisonment for not more than *ten* years for perjury committed before a court of justice, except upon trial for felony, and imprisonment for not more than *five* years for all other cases.

**Summary  
committal  
of wit-  
nesses who  
have com-  
mitted  
perjury.**

**§ 159.** Whenever it appears probable to any court of record that any person who has testified in any action or proceeding in such court has committed perjury, such court may immediately commit such person by an order or process for that purpose to prison, or take a recognizance with sureties for his appearing and answering to an indictment for perjury.

Compare 2 Rev. Stat., 681, § 5.

**Witnesses  
necessary  
to prove the  
perjury may  
be bound  
over to  
appear.**

**§ 160.** Such court shall thereupon bind over the witnesses to establish such perjury to appear at the proper court to testify before the grand jury, and upon the trial in case an indictment is found for such perjury; and shall also cause immediate notice of such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.

2 Rev. Stat., 681, § 6.

**Documents  
necessary  
to prove  
such per-  
jury may be  
detained.**

**§ 161.** If, upon the hearing of such action or proceeding in which such perjury has probably been committed, any papers or documents produced by either party shall be deemed necessary to be used on the prosecution for such perjury, the court may by order detain such papers or documents from the party producing them, and direct them to be delivered to the district attorney.

2 Rev. Stat., 682, § 7.

**§ 162.** Every person who willfully procures another person to commit any perjury is guilty of subornation of perjury. Suborna-  
tion of  
perjury  
defined.

*2 Rev. Stat., 681, § 3.*

**§ 163.** Every person guilty of subornation of perjury is punishable in the same manner as he would be if personally guilty of the perjury so procured. Punish-  
ment  
of suborna-  
tion.

*2 Rev. Stat., 681, § 4.*

**§ 164.** No person who has been convicted of perjury, or of subornation of perjury, shall thereafter be received as a witness in any action, proceeding or matter whatever upon his own behalf; nor in any action or proceeding between adverse parties, against any person who shall object thereto, until the judgment against him has been reversed. But where such person has been actually received as a witness contrary to the provisions of this section, his incompetency shall not prejudice the rights, innocently acquired, of any other person claiming under the proceeding in which such person was so received.

Convict of  
perjury  
declared in-  
competent  
as a wit-  
ness.

*Modification of the existing rule.*—As the statute defining the powers of the commissioners of the Code expressly excludes from their consideration the law of evidence; and as the commissioners of practice and pleading have already (*Rep. Code Civ. Pro.*, § 1708) recommended the adoption of a general rule that those who have been convicted of crime shall not be excluded as witnesses, the commissioners would not suggest the above section, were the rule which it embodies a new one in our jurisprudence. But a rule even broader than that here stated, has been so long established, and seems so just and reasonable an exception to the general principle enunciated in the Code of Civil Procedure, that it appears proper to recall it to the attention of the legislature.

The section in the text is suggested as a substitute for the provision of *2 Rev. Stat., 681, § 1*, which forbade a convicted perjurer from being received as a witness "in any matter or cause whatever." This latter language seems broad enough to disqualify a convicted perjurer from proving the execution of a deed, or testifying upon any similar *ex parte* proceeding. It is obvious that the rule of exclusion, if pressed to this extent, in cases where the interests of third persons are affected, cannot fail to result in injustice; inasmuch as the only method of enforcing it, where the

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testimony is taken *ex parte*, is by declaring the proceeding taken, to be null and void for the incompetency of the witness afterwards proved. In the case of a convict produced as a witness by another person, the party who produces him cannot be regarded as any more chargeable with his previous perjury, or even with notice of it, than the person to be affected by his testimony. The rule should therefore be limited to contested proceedings, and the party against whom the convict is called, should be required to interpose objection, seasonably, to the examination. Where the convict comes forward as a witness in his own behalf—*e. g.*, to verify a petition for his own discharge in insolvency, the above reason for limiting the rule does not apply.

*Constitutionality of the rule.*—The commissioners have noticed that the language in which the pardoning power vested in the Governor is defined by the constitution of 1846, suggests a possible objection to the rule of disqualification, in so far as it applies to exclude a convict of perjury who has been pardoned. By the Revised Statutes, such person remains disqualified notwithstanding the pardon; and this has been the familiar rule in this State from the earliest period. The provision is borrowed from the Stat., 5 *Eliz.*, ch. 9. It was enacted in this State in 1788 (2 *Greenl. L.*, 36, § 1; 2 *Jones & V.*, 207, § 1), and was reenacted in 1801 (1 *Kent & R.*, 313, § 1; 1 *Webst. & S.*, 313, § 1; 1 *Laws of 1813*, 171, § 1); and again in the Revised Statutes; and the commissioners are not aware that it was ever questioned as an unconstitutional restriction upon the pardoning power. The constitution of 1846, however, confers the pardoning power upon the Governor in these words: “The Governor shall have the power to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment, *upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons*” (art. IV, § 5). The words in italic are new in the constitution, though the legislature conferred upon the Governor the power to impose conditions, in substantially the same language, by a very early statute. (Act of March 12, 1794; 3 *Greenl.*, 113; 1 *Kent & R.*, 158; 1 *Laws of 1813*, 126; 2 *Rev. Stat.*, 745, § 21.) And the objection anticipated is that these words exclude any power on the part of the legislature to impose any restriction or limitation upon pardons except such as relates to the manner of applying for them, and that the rule which disqualifies a convicted perjurer, notwithstanding pardon, is in effect a restriction or limitation upon the effect of the pardon.

The commissioners are of opinion, however, that in

view of the long-established and unquestioned practice in this State, the rule is not to be regarded as a restriction upon the pardon, but rather as an incompetency or disqualification based upon public policy, and which it is in the power of the legislature to impose or remove. It is analogous in this respect to the rule prohibiting the disclosure by physicians, clergymen, &c., of communications made to them in professional confidence. The provision that no pardon of a person sentenced to imprisonment for life shall restore him to the rights of a previous marriage, &c. (2 Rev. Stat., 139, § 7), trenches even more closely upon the executive power than the rule retaining the disqualification to testify. Certainly, no innovation upon the existing rule could have been intended by the framers of the constitution of 1846. In introducing the clause relating to conditions, the intention was to express in the constitution the power already long established by statute, whereby the Governor might impose a condition or grant a qualified pardon in cases where he considered the offender undeserving of an unconditional one. And the clause respecting regulations relative to the manner of applying for pardons, was intended to enable the legislature to protect the community by requiring such modes of obtaining pardons to be pursued as should ensure full information of all relevant facts being brought before the Governor. Neither clause was designed to curtail the well-established legislative rule which retained the disqualification of a convict of perjury, notwithstanding a pardon granted.

## CHAPTER VI.

### FALSIFYING EVIDENCE.

#### SECTION 165. Offering false evidence.

- 166. Deceiving a witness.
- 167. Preparing false evidence.
- 168. Destroying evidence.
- 169. Preventing or dissuading witnesses from attending.
- 170. Bribing witnesses.

§ 165. Every person who, upon any trial, proceeding, inquiry or investigation whatever, authorized by law, offers in evidence, as genuine, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered, is punishable in the same manner as Offering  
false evi-  
dence.

the forging or false alteration of such instrument is made punishable by the provisions of this Code.

**Deceiving a witness.**

§ 166. Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever, proceeding by authority of law, with intent to affect the testimony of such witness, is guilty of misdemeanor.

**Preparing false evidence.**

§ 167. Every person guilty of preparing any book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced, as genuine, upon any trial, proceeding or inquiry whatever, authorized by law, is guilty of felony.

The Tracy Peerago case (10 *Cl. & F.*, 154), though involving no points of criminal law, supplies an illustration relevant to this subject. In that case a claimant to a peerage produced manuscript entries in a prayer book, alleged to be of ancient date; and, at a very late stage of the proceeding, called witnesses to testify to an inscription upon a tombstone, tending to make out the pedigree necessary to the claimant's case. The tombstone itself could not be produced; and, the circumstances of the case involving suspicion, the claim was dismissed; Lord CAMPBELL expressing his conviction that the case was founded on fraud and forgery.

**Destroying evidence.**

§ 168. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, proceeding, inquiry or investigation whatever, authorized by law, willfully destroys the same, with intent thereby to prevent the same from being produced, is guilty of misdemeanor.

Compare a statute of New Jersey upon this subject; *Elmer's Digest*, 113, § 60; *Nixon's Digest*, 188, § 69.

**Preventing or dissuading witness from attending.**

§ 169. Every person who willfully prevents or dissuades any person who has been duly summoned or

subpenaed as a witness from attending, pursuant to the command of the summons or subpœna, is guilty of a misdemeanor.

§ 170. Every person who gives or offers, or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony, is guilty of a misdemeanor.

Bribing  
witnesses.

## CHAPTER VII.

### OTHER OFFENSES AGAINST PUBLIC JUSTICE.

- SECTION 171. Injury to records and embezzlement committed by ministerial officers.
172. Permitting escapes, and other unlawful acts, committed by ministerial officers.
  173. Officer refusing to receive prisoner into his custody.
  174. Delaying to take person arrested for crime before a magistrate.
  175. Making arrests, &c., without lawful authority.
  176. Misconduct in executing search warrant.
  177. Refusing to aid officer in making an arrest.
  178. Refusing to make an arrest.
  179. Resisting execution of process, aiding escapes, &c., in county which has been proclaimed in insurrection.
  180. Obstructing public officer in the discharge of his duty.
  181. Taking extra judicial oaths.
  182. Administering extra judicial oaths.
  183. Compounding crimes.
  184. Compounding prosecutions.
  185. Attempting to intimidate judicial or ministerial officers, jurors, &c.
  186. Suppressing evidence.
  187. Buying lands in suit.
  188. Buying pretended titles.
  189. Mortgage of lands under adverse possession not prohibited.
  190. Common barratry defined.
  191. Declared a misdemeanor.
  192. What proof is required.
  193. Interest.
  194. Buying demands or suit by an attorney.
  195. Buying demands by a justice or constable, for suit before a justice.
  196. Lending money upon claims delivered for collection.

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**SECTION 197. Forfeiture of office.**

- 198. Receiving claims in what cases allowable.
- 199. Application of previous sections to persons prosecuting in person.
- 200. Witness' privilege restricted.
- 201. Criminal contempts.
- 202. Renewing application to stay trial of an indictment, without leave.
- 203. Grand juror acting after challenge has been allowed.
- 204. Disclosure of depositions taken by a magistrate.
- 205. Disclosure of depositions returned by grand jury with presentation.
- 206. Fraud in applying for insolvent's discharge.
- 207. Racing near a court.
- 208. Selling liquor in court houses or prisons, or near election polls.
- 209. Misconduct by attorneys.
- 210. Permitting attorney's name to be used.
- 211. In what cases lawful.
- 212. Fraudulent pretenses relative to birth of infant.
- 213. Substituting one child for another.
- 214. Importing foreign convicts.
- 215. Omission of duty by public officer.
- 216. Commission of prohibited acts.
- 217. Disclosing fact of indictment having been found.
- 218. Grand juror disclosing what transpired before the grand jury.
- 219. Instituting suit in false name.
- 220. Maliciously procuring search warrant.
- 221. Unauthorized communications with convict in state prison.
- 222. Neglect to return names of constables.
- 223. False certificates by public officers.

Injury to records and embezzlement committed by ministerial officers.

**§ 171. Every sheriff, coroner, clerk of a court, constable or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either:**

1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office; or,
2. Fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property entrusted to him in virtue of his office,

Is guilty of felony.

Permitting escapes and other unlawful acts committed by ministerial officers.

**§ 172. Every sheriff, coroner, clerk of a court, constable, or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either:**

1. Allows any person lawfully held by him in custody to escape or go at large, except as may be permitted by law; or,
2. Receives any gratuity or reward, or any security or promise of one, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape is attempted or not; or,
3. Commits any unlawful act tending to hinder justice,

**Is guilty of misdemeanor.**

See 2 Rev. Stat., 684, § 18.

**§ 173. Every officer who, in violation of a duty imposed upon him by law as such officer to receive into his custody any person, as a prisoner, willfully neglects or refuses so to receive such person into his custody, is guilty of a misdemeanor.**

Officer refusing to receive prisoner into his custody.

See 2 Rev. Stat., 684, § 18.

**§ 174. Every public officer or other person having arrested any person upon any criminal charge, who willfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.**

Delaying to take person arrested before a magistrate.

This section is intended to enforce the well understood duty of officers or private persons who have made arrests. The arrested person is entitled to a speedy hearing upon the charge preferred against him. The subject might indeed be considered covered so far as public officers are concerned, by the general provision elsewhere reported (§ 215), making it a misdemeanor for an officer willfully to omit an official duty. But there would still remain cases in which a private person is authorized to make an arrest. The commissioners deem it the safer course to make express provision upon the subject.

**§ 175. Every public officer or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person, or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without due and legal process**

Making arrests, &c., without lawful authority.

or other lawful authority therefor, is guilty of a misdemeanor.

*2 Rev. Stat., 692, § 11.*

Misconduct  
in execut-  
ing search  
warrant.

§ 176. Every peace officer, who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity is guilty of a misdemeanor.

*Rep. Code Cr. Pro., § 882.*

Refusing to  
aid officer  
in making  
an arrest.

§ 177. Every person, who, after having been lawfully commanded to aid any officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer is guilty of a misdemeanor.

This section is suggested as a substitute for sections 86 and 981 of the *Rep. Code Cr. Pro.* For the various cases in which a private citizen may lawfully be called upon to aid in an arrest, &c., see *Rep. Code Cr. Pro.*, §§ 64, 84, 92, 167, 180, 868, 980, 982.

Refusing to  
make an  
arrest.

§ 178. Every person, who, after having been lawfully commanded by any magistrate to arrest another person, willfully neglects or refuses so to do, is guilty of a misdemeanor.

Resisting  
execution  
of process;  
aiding es-  
capes, &c.,  
in county  
which has  
been pro-  
claimed in  
insurrec-  
tion.

§ 179. Every person, who, after proclamation issued by the governor declaring any county to be in a state of insurrection, resists or aids in resisting the execution of process in the county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting a force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the state prison for not less than two years.

*Rep. Code Cr. Pro., § 99.*

Obstructing  
public offi-  
cer in the  
discharge of  
his duty.

§ 180. Every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office is guilty of a misdemeanor.

§ 181. Every person who takes an oath before an officer or person authorized to administer judicial oaths, except when such oath is required or authorized by law, or is required by the provisions of some contract as the basis of or in proof of a claim, or when the same has been agreed to be received by some person as proof of any fact, in the performance of any contract, obligation or duty, instead of other evidence, is guilty of a misdemeanor.

Taking extra judicial oaths.

§ 182. Every officer or other person who administers an oath to another person, or who makes and delivers any certificate that another person has taken an oath, except when such oath is required or authorized by law, or is required by the provisions of some contract as a basis of or in proof of a claim, or when the same has been agreed to be received by some person as proof of any fact in the performance of any contract, obligation or duty, instead of other evidence, is guilty of a misdemeanor.

Administering extra judicial oaths.

It is known that, in many cases, persons employ the sanctity of a judicial oath to gain credence for their statements, yet escape punishment for falsity in those statements because the penalties of perjury do not extend to mere voluntary oaths. Sworn statements are frequently published to advance the sales of a particular article; or to support one side in a public controversy. The commissioners intend, by the two sections above, to restrict the practice of taking or administering these voluntary oaths. The provisions reported will allow affidavits to be made in proof of loss under policies of insurance; in proof of facts necessary to show title, between vendor and purchaser of real property; and in all the other cases where there is an agreement to receive them instead of pursuing the ordinary methods of legal investigation. And by antecedent provisions of this Code, the penalties of perjury are extended to willful false swearing in these cases, as well as in cases where the oath is required by law. (See § 150, and note.)

§ 183. Every person who, having knowledge of the actual commission of a crime or violation of statute, takes any money or property of another, or any gratuity or reward, or any engagement or pro-

Compound-ing crimes.

mise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime, or violation of statute, or to abstain from any prosecution therefor, or to withhold any evidence thereof, is punishable as follows :

1. By imprisonment in a state prison, not exceeding five years, or in a county jail, not exceeding one year, where the crime compounded is one punishable either by death or by imprisonment in a state prison for life ;
2. By imprisonment in a state prison, not exceeding three years, or in a county jail, not exceeding six months, where the crime compounded was punishable by imprisonment in a state prison for any other term than for life ;
3. By imprisonment in a county jail, not exceeding one year, or by fine, not exceeding two hundred and fifty dollars, or by both such fine and imprisonment, where the crime or violation of statute compounded is a crime punishable by imprisonment in a county jail or by fine, or is a misdemeanor, or violation of statute for which a pecuniary or other penalty or forfeiture is prescribed.

Embodyes 2 Rev. Stat., 689, §§ 17, 18; *Id.*, 692, § 12; *Id.*, 897, § 40.

That the offense of compounding may extend as well to misdemeanors as to felonies, see *Jones v. Rice*, 18 *Pick.*, 440.

*Compounding prosecutions.*

§ 184. Every person who takes any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound, discontinue or delay any prosecution then pending for any crime or violation of statute, or to withhold any evidence, in aid thereof, is guilty of a misdemeanor.

*Attempting to intimidate judicial or ministerial*

§ 185. Every person who, directly or indirectly, utters or addresses any threat or intimidation to any judicial or ministerial officer, or to any juror, referee,

arbitrator, umpire or assessor, or other person authorized by law to hear or determine any controversy, with intent to induce him either to do any act not authorized by law, or to omit or delay the performance of any duty imposed upon him by law, is guilty of a misdemeanor. officers,  
jurors, &c.

§ 186. Every person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper, or other matter or thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent prevent any person having in his possession any book, paper, or other matter or thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor. Suppres-  
sing evi-  
dence.

§ 187. Every person who takes any conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in the possession thereof, while such lands or tenements are the subject of controversy, by suit in any court, knowing the pendency of such suit and that the grantor was not in possession of such lands or tenements, is guilty of a misdemeanor. Buying  
lands in  
suit.

See 2 Rev. Stat., 691, § 5; also, *Wolcott v. Knight*, 6 Mass., 418; *Everden v. Beaumont*, 7 Id., 76; *Sweet v. Poor*, 11 Id., 549; *Bringly v. Whitney*, 5 Pick., 349; to the effect that the purchase of a dormant title to lands from a party not seised, by a stranger out of possession, when made with intent to disturb the tenant in possession, constitutes the offense of maintenance and is indictable at common law.

§ 188. Every person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof Buying pre-  
tended  
titles.

or the person making such promise or covenant has been in possession, or he and those by whom he claims, have been in possession of the same or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor.

*2 Rev. Stat., 691, § 6.*

Mortgage of lands under adverse possession not prohibited.

§ 189. The two last sections shall not be construed to prevent any person having a just title to lands, upon which there shall be an adverse possession, from executing a mortgage upon such lands.

*2 Rev. Stat., 691, § 7; 1 Id., 739, § 148.*

Common barratry defined.

§ 190. Common barratry is the practice of exciting groundless judicial proceedings.

Declared a misdemeanor.

What proof is required.

§ 191. Common barratry is a misdemeanor.

§ 192. No person can be convicted of common barratry, except upon proof that he has excited suits or proceedings at law, in at least three instances, and with a corrupt or malicious intent to vex and annoy.

Interest.

§ 193. Upon a prosecution for common barratry, the fact that the accused was himself a party in interest or upon the record to any proceedings at law, complained of, is not a defense.

Buying demands or suit by an attorney.

§ 194. Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action with intent to bring suit thereon is guilty of a misdemeanor.

Buying demands by a justice or constable for suit before a justice.

§ 195. Every justice of the peace and every constable who, directly or indirectly, buys or is interested in buying any evidence of debt or thing in action for the purpose of commencing any suit thereon before a justice, is guilty of a misdemeanor.

Lending money upon claims delivered for collection.

§ 196. Every attorney, justice of the peace or constable, who, directly or indirectly, lends or advances

any money or property, or agrees for or procures any loan or advance, to any person as a consideration for or inducement towards committing any evidence of debt or thing in action to such attorney, justice, constable, or any other person, for collection, is guilty of a misdemeanor.

§ 197. Every person convicted of a violation of either of the three preceding sections, in addition to the punishment, by fine and imprisonment, prescribed therefor by this Code, forfeits his office.

§ 198. Nothing in the four preceding sections shall be construed to prohibit the receiving in payment of any evidence of debt or thing in action for any estate, real or personal, or for any services of an attorney actually rendered, or for a debt antecedently contracted; or the buying or receiving any evidence of debt or thing in action for the purpose of remittance, and without any intent to violate the preceding section.

The four sections preceding are founded upon the provisions of 2 *Rev. Stat.*, 267, §§ 235, 236; *Id.*, 288, §§ 71-74.

The words "counsellor or solicitor" (2 *Rev. Stat.*, 288, §§ 71-74, are omitted; because, under the existing law, those offices are, for all purposes, within the purview of these sections, merged in that of the attorney. The other changes made are intended merely to attain greater clearness, and conciseness of expression.

§ 199. The provisions of sections 194, 196, and 198, relative to the buying of claims by an attorney, with intent to prosecute them, or to the lending or advancing of money by an attorney in consideration of a claim being delivered for collection, shall apply to every case of such buying a claim, or lending or advancing money, by any person prosecuting a suit or demand in person.

Application  
of previous  
sections to  
persons  
prosecuting  
in person.

*Laws of 1847, ch. 470, § 47.*

§ 200. No person shall be excused from testifying, in any civil action, to any facts showing that an evi-

Witness'  
privilege  
restricted

dence of debt or thing in action has been bought, sold or received contrary to law, upon the ground that his testimony might tend to convict him of a crime. But no evidence derived from the examination of such person shall be received against him upon any criminal prosecution.

Compare 2 *Rev. Stat.*, 288, §§ 75-82. The sections of the Revised Statutes contain provisions, in detail, enabling a defendant to procure the testimony of the guilty party in aid of a defense setting up that the purchase of the demand in suit was contrary to law. Since the statute enabling either party to a suit to call his adversary as a witness these special provisions are no longer necessary to be retained.

*Witness' privilege.* It may here be remarked that section 1854, of *Rep. Code Civ. Pro.*, prescribes the general rule that a witness "need not give an answer which will have a tendency to subject him to punishment for felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed."

The Commissioners have retained in the Penal Code the various provisions of the existing law whereby, in respect to particular crimes, the privilege to refuse to testify is removed; *e. g.*, in respect to buying demands for suit; duelling, &c. But they have added no new provisions of this character. The chapter of general provisions and explanations, at the close of this Code, contains a section prescribing that the various provisions of the Code, which declare that evidence obtained upon the examination of a person as a witness shall not be received against him in any criminal proceeding, shall not be construed to forbid such evidence being proved against such person upon a proceeding for perjury committed in such examination.

*Criminal  
contempts.*

§ 201. Every person guilty of any contempt of court of either of the following kinds, is guilty of misdemeanor:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;
2. Behavior of the like character, committed in the

presence of any referee or referees, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law;

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court;

4. Willful disobedience of any process or order lawfully issued by any court;

5. Resistance willfully offered by any person to the lawful order or process of any court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any court. But no person can be punished, as for a contempt, in publishing a true, full, and fair report of any trial, argument, decision, or proceeding had in court;

8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided by sections 544 and 545 of the Code of Criminal Procedure.

*Subd. 1, 2, 3, 4, 5, 6, and 7,* of the above section, are framed upon the existing provisions of 2 Rev. Stat., 278, § 10. *Id.*, 692, § 14, modified to extend to all courts, instead of to courts of record only.

*Subd. 2,* is designed to extend the principles embodied in subdivision 1, to embrace contempts committed before referees and sheriffs and other juries. This enlargement of the present rule is demanded by the extension of the practice of referring causes.

*Subd. 7.* It has been decided that a publication, pending a suit, reflecting upon the court, the parties, witnesses, jurors or counsel, or intended to prejudice the public mind in regard to the cause, is a contempt. Bayard *v.* Passmore, 3 *Leak's Penn.*, 438; Van Hook's case, 3 *City H. Rec.*, 64; Noah's case, *Id.*, 31; *Respublica v.*

## THE PENAL CODE

Oswald, 1 *Dall.*, 319; Hollingsworth *v.* Duane, *Wall.*, 77, 102. But no reason is perceived for enlarging the restricted provision of the Revised Statutes on the subject. The last clause of this subdivision is, however, deemed unnecessary by the Commissioners; inasmuch as section 2 of this Code provides that no person can be punished criminally except as prescribed by this Code, or by some of the statutes which it specifies as continuing in force; and neither the Code nor any of those acts contain any provision authorizing the punishment of a person for publishing a true account of judicial proceedings. As, however, the clause is found in the existing law, the Commissioners retain it lest the omission should give rise to the inference that a change in the law was intended.

*Subd.* 8, conforms to the provisions of sections 546 and 547 of the *Rep. Code Cr. Pro.*

Renewing application to stay trial of an indictment without leave.

§ 202. Every attorney or counselor-at-law who, knowing that an application has been made for an order staying the trial of an indictment to a judge, authorized to grant the same, and has been denied, without leave reserved to renew it, makes an application to another judge to stay the same trial, is guilty of misdemeanor.

*Rep. Code Cr. Pro.*, § 369.

Grand juror acting after challenge has been allowed.

§ 203. Every grand juror who, with knowledge that a challenge, interposed against him by a defendant, has been allowed, is present at or takes part or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

*Rep. Code Cr. Pro.*, § 244.

Disclosure of depositions taken by a magistrate.

§ 204. Every magistrate or clerk of any magistrate who willfully permits any deposition taken on an information or examination of a defendant before such magistrate, and remaining in the custody of such magistrate or clerk, to be inspected by any person, except a judge of a court having jurisdiction of the offense, the attorney-general, the district-attorney of the county and his assistants, and the defendant and his counsel, is guilty of a misdemeanor.

**§ 205.** Every clerk of any court who willfully permits any deposition returned by any grand jury with a presentment made by them, and filed with such clerk, to be inspected by any person, except the court, the deputies or assistants of such clerk, and the district attorney and his assistants, until after the arrest of the defendant, is guilty of a misdemeanor.

Disclosure  
of deposi-  
tions re-  
turned by  
grand jury  
with pro-  
sentment

This section and the one preceding it are designed to carry into effect the provisions of *Rep. Code Cr. Pro.*, §§ 204, 205, and §§ 273 and 274. Both sections have been so modified as to permit depositions to be examined by the *assistants* of district attorneys.

**§ 206.** Every insolvent debtor who, having applied to any court for a discharge from an imprisonment on execution, under the provisions of Part III of the Code of Civil Procedure, Title X, Chapter I, or for a discharge from his debts, under the provisions of Chapter II, of the same Title, either :

Fraud in  
applying for  
insolvent's  
discharge.

1. Willfully conceals any part of his estate or effects, or any books or writings relative thereto, either before or after making any transfer and delivery of his property to a receiver appointed under said provisions ; or,

2. Willfully omits to disclose to the court, before whom his application may be pending, any debts or demands which he has collected, or any transfer of his property which he has made, after presenting to such court his application for a discharge, is guilty of a misdemeanor.

The substance of the foregoing provisions is taken from those of 2 *Rev. Stat.*, 691, § 4. They are, however, adapted to the modifications in the method of obtaining insolvents' discharges proposed in *Rep. Code of Civ. Pro.*, §§ 1595-1606.

**§ 207.** Every person concerned in any racing, running, or other trial of speed between any horses or other animals, within one mile of the place where any court is actually sitting, is guilty of a misdemeanor.

Racing near  
a court.

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Selling liquor in court houses or prisons or near election polls.

**§ 208.** Every person who sells any spirituous or intoxicating liquor within, or brings with intent to sell, or offer or expose for sale therein, any such liquor into, either :

1. Any building established as a court house for the holding of courts of record while any session of such court is being held therein, except in such part of such building not appropriated to the use of courts or of juries attending them, in which such sale has been authorized by a resolution of the board of supervisors of the county ; or,
2. Any building established as a jail or prison ; or,
3. Any building or shed, outhouse, porch, yard or curtilage appertaining to any building which, or any part of which, is at the time occupied or used for holding the polls at an election of any public officer of this state or of the United States, or for canvassing votes cast at such election ;

Is guilty of misdemeanor.

Embraces provisions of 2 Rev. Stat., 291, § 95  
*Id.*, 431, § 29.

Misconduct by attorneys.

**§ 209.** Every attorney who, whether as attorney or as counselor, either:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ; or,
2. Willfully delays his client's suit with a view to his own gain ; or,
3. Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for,

Is guilty of misdemeanor, and in addition to the punishment prescribed therefor by this Code, he forfeits to the party injured treble damages, to be recovered in a civil action.

See 2 Rev. Stat., 287, §§ 69, 70.

"As attorney or as counselor." In general throughout the Code, the Commissioners have used the word "attor."

ney," as embracing all classes of legal practitioners, conformably to the existing law by which both the functions of the attorney and those of the counselor-at-law are united in the same person. (See note to section 198, above.) But it has been held that although candidates for admission to the bar are now admitted as attorneys and as counselors at the same time, yet the offices are still distinct. (*Easton v. Smith*, 1 *E. D. Smith*, 318; *Brady v. Mayor, &c., of N. Y.*, 1 *Sandf.*, 559.) As some of the acts prohibited in the above section might be committed by one acting only as a counselor, and who, though in fact also an attorney, had no retainer as such in the cause to which the misconduct related, the Commissioners have declared the acts punishable in which ever capacity the defendant acts.

**§ 210.** If any attorney knowingly permits any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by the next section, such attorney, and every person who shall so use his name, is guilty of a misdemeanor.

Permitting  
attorneys  
names to be  
used.

The existing law imposes a forfeiture of fifty dollars, instead of a criminal punishment, for this species of misconduct. (2 *Rev. Stat.*, 287, § 70.) The Commissioners recommend that the prohibition be restricted by allowing an attorney to permit his name to be used in the cases specified in the following section; and that, except as therein permitted, such use of the name be made a misdemeanor.

**§ 211.** Whenever an action or proceeding is authorized by law to be prosecuted or defended in the name of the people, or of any public officer, board of officers, or municipal corporation, on behalf of another party, the attorney-general, or district attorney, or attorney of such public officer or board or corporation may permit any proceeding therein to be taken in his name by an attorney to be chosen by the party in interest.

In what  
cases law-  
ful.

**§ 212.** Every person who fraudulently produces an infant, falsely pretending it to have been born of any parent whose child would be entitled to inherit any

Fraudulent  
pretenses  
relative to  
birth of  
infant.

## THE PENAL CODE

real estate or to receive a share of any personal estate, with intent to intercept the inheritance of any such real estate, or the distribution of any such personal estate from any person lawfully entitled thereto, is punishable by imprisonment in a state prison not exceeding ten years.

This is substantially the provision of *2 Rev. Stat.*, 676, § 51. The Commissioners would have recommended the enactment of a more extended provision, which should forbid the holding out of a child as born of other than its true parents, were it not that such an enactment would render necessary a system of provisions regulating and legalizing the adoption of children. The subject of adoptions is one which the Commissioners have under consideration, and some systematic provisions relative to it may perhaps be reported, but the topic does not come within the Penal Code.

Substituting one child for another.

§ 213. Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is punishable by imprisonment in a state prison not exceeding seven years.

Founded upon *2 Rev. Stat.*, 677, § 52. The changes introduced are two. The provisions of the Revised Statutes is limited to cases where the infant confided to the accused is under six years. The Commissioners are of opinion that while the substitution may become less and less feasible with the advancing age of the child, it is not the less criminal, if perpetrated, because the child has passed the age of six; and they therefore omit the restriction. They also use the words "substitutes *or* produces," in place of "substitutes *and* produces;" in order to embrace cases in which the child may not be exhibited in person to the parent or guardian.

Importing foreign convicts.

§ 214. Every owner, master or commander of any vessel arriving from a foreign country who knowingly lands or permits to land at any port, city, harbor, or place within this state, any passenger or hand who is a foreign convict of any crime which, if committed within this state, would be punishable

therein, without giving notice thereof to the mayor of such city, or other principal municipal officer of such port or place, is guilty of a misdemeanor.

Founded upon *Laws* of 1833, ch. 230, § 1. That act renders the bringing within this state of any foreign convict of felony, a misdemeanor, if done with intent to land him or to permit him to land. The objection to this form of the provision is that if the character of the felon is not known to the master until after the ship has left the foreign port, upon her voyage home, the master may have no option but to bring him within this state. The provision might be relieved of injustice in its operation in this class of cases by specifying the taking on board of a foreign convict, with intent to bring him to this country, as the criminal act. But this would be to declare punishable an act committed without this state, which ought only to be done in cases involving a special necessity. The Commissioners have, therefore, allowed masters to relieve themselves of criminal responsibility by giving notice of the character of the passenger to the public authorities of the place where he is landed.

The Commissioners have also substituted the word "crime" for "felony," in view of the increasing evils suffered by our people from the influx of foreign criminals.

**§ 215.** Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Omission  
of duty by  
public  
officer.

See 2 *Rev. Stat.*, 696, §§ 38, 40. The enactment of this provision will render it unnecessary to embrace section 91 of the *Rep. Code Cr. Pro.* in this Code. That section is as follows. "Every magistrate or officer, authorized to keep the peace, having notice of an unlawful or riotous assembly, who neglects to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, is guilty of a misdemeanor."

**§ 216.** Where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor.

Commis-  
sion of pro-  
hibited acts.

See 2 *Rev. Stat.*, 696, § 39.

**Disclosing fact of indictment having been found.**

§ 217. Every grand juror, district attorney, clerk, judge, or other officer, who, excepting by issuing or in executing a warrant to arrest the defendant, willfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

See *Rep. Code Cr. Pro.*, §§ 276, 277.

**Grand juror disclosing what transpired before the grand jury.**

§ 218. Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor.

See *Rep. Code Cr. Pro.*, §§ 267-269.

**Instituting suit in false name.**

§ 219. Every person who maliciously institutes or prosecutes any action or legal proceeding, or makes or procures any arrest, in the name of a person who does not exist or has not consented that it be instituted or made, is guilty of a misdemeanor.

This provision has been prepared as a substitute for 2  
*Rev. Stat.*, 550, § 1.

**Maliciously procuring search warrant.**

§ 220. Every person who maliciously, and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

*Rep. Code Cr. Pro.*, § 881.

**Unauthorized communications with convict in state prison**

§ 221. Every person who, not being authorized by law, or by a written permission from an inspector, or by the consent of the warden, communicates with any convict in any state prison, or brings into or conveys out of any state prison any letter or writing to or from any convict, is guilty of a misdemeanor.

See *Laws of 1847*, ch. 460, § 7.

**Neglect to return names of constables.**

§ 222. Every town clerk who willfully omits to return to the county clerk the name of any person who has qualified as constable, as required by subdivision

**4 of section 1021 of the Political Code, is punishable by a fine not exceeding ten dollars.**

*Rip. Pol. Code, § 1022.*

**§ 223. Every public officer who being authorized by law to make or give any certificate or other writing, knowingly makes and delivers as true any such certificate or writing containing any statement which he knows to be false, is guilty of a misdemeanor.**

False cer-  
tificates by  
public offi-  
cers.

## CHAPTER VIII.

### CONSPIRACY.

**SECTION 224. Criminal conspiracies defined.**

225. Conspiracies against the peace of the state.

226. Overt act, when necessary.

**§ 224. If two or more persons conspire, either :**

Criminal  
conspira-  
cies defined

1. To commit any crime ; or,
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime ; or,
3. Falsely to move or maintain any suit, action or proceeding ; or,
4. To cheat and defraud any person of any property by any means which are in themselves criminal or by any means which, if executed, would amount to a cheat or to obtaining money or property by false pretenses ; or,
5. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws,

They are guilty of a misdemeanor.

See 2 Rev. Stat., 691, § 8. Instead of the word "offense," employed in the Revised Statutes, in subdivisions 1 and 2, the Commissioners have used "crime." In section 3 of this Code the Commissioners have defined "public offense" as synonymous with "crime;" leaving the word "offense" to be used in a broader signification,

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including the graver wrongs towards individuals which are not cognizable by the criminal law. In the section of the Revised Statutes "offense" is plainly used as synonymous with "crime," and the Commissioners, in substituting the latter, have intended no change in the law, but merely to secure a consistent use of terms throughout the Code.

The common law definitions of conspiracy are broader than that given in our Revised Statutes.

Hawkins says that it is a consultation and agreement between two or more persons either falsely to charge another with a crime, punishable by law; or wrongfully to injure or prejudice a third person, or any body of men in any other manner; or to commit any punishable offense by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent or by improper means. (*Hawk. P. C.*, ch. 72, § 2.)

Archbold defines conspiracy to be "an agreement between two or more persons:

1. Falsely to charge another with a crime punishable by law.
2. Wrongfully to injure or prejudice a third person, or any body of men in any manner.
3. To commit any offense punishable by law.
4. To do any act with intent to prevent the course of justice.
5. To effect a legal purpose with a corrupt intent, or by improper means.
6. Combination by journeymen to raise their wages. (*Arch. Cr. Pl.*, 390, 1.)

In the State *v.* Buchanan (5 *Har. & J.*, 317, 351), it is said that, by a course of decisions running through a space of more than four hundred years, from the reign of Edw. III to the 59 Geo. III, without a single conflicting adjudication, these points are clearly settled.

That a conspiracy to do any act that is criminal *per se* is an indictable offense at common law.

That an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal, nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public; *e. g.*, a combination by workmen to raise their wages. 3. For a conspiracy to extort money from another or to injure his reputation by means not indictable, if practised by an individual, as by verbal defamation, and that whether it be to charge him with an indictable offense or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. 5. For a malicious conspiracy

to impoverish, or ruin a third person in his trade, or profession. 6. For a conspiracy to defraud a third person by means of an act *not per se* unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it could not be determined on at the time.

The Revisers, in their note to the section of the Revised Statutes, which is embodied in the section in the text, assign the following reason for restricting the definition of conspiracy within narrower limits than those of the common law. "The great difficulty in enlarging the definition of this offense consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud by compelling a discovery on oath. It is a sacred principle of our institutions that no man shall be compelled to accuse himself of any crime, which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed by declaring any private fraud when committed by two, or any concert to commit it, criminal. Frauds and combinations to defraud constitute the mass of equity business, and seldom is a case presented when there are not at least two parties to a fraud."

This was said in 1828, before the passage of the statute authorizing the unrestricted examination of a defendant to a bill in chancery charging fraud. That statute was passed in 1833. It provided in substance that a defendant might be compelled to answer any bill in chancery, charging the defendant with being a party to any conveyance made with intent to defraud; or when the defendant shall be charged with any fraud whatever; but no such answer should be read in evidence against any party thereto on any complaint or on the trial of any indictment for the fraud charged in such bill. (*Laws of 1833, ch. 14.*) To some extent the adoption of this principle obviates the objection urged by the revisers to a full recognition of the common law definition of conspiracy. But as the provisions of the Revised Statutes have stood without objection for a long period, and are believed to be satisfactory, in practical operation, the Commissioners have not thought it best to enlarge them; except that they suggest the addition of the section next following, which is new. Their reason for refraining from reporting new exceptions to the general rule that a witness shall not be compelled to criminate himself, are stated in their note to section 200 of this Code.

*Other conspiracies.* The Revised Statutes also contain a section (2 Rev. Stat., 692, § 9.) declaring that no conspiracies other than such as are enumerated in the statute are punishable criminally. This provision is here omitted, as unnecessary, in view of the general one to like effect, embodied in section 2.

**Conspiracies against  
the peace  
of the state.**

§ 225. If two or more persons, being out of this state, conspire to commit any act against the peace of this state, the commission or attempted commission of which, within this state, would be treason against the state, they are punishable by imprisonment in a state prison not exceeding ten years.

**Overt act.  
when neces-  
sary.**

§ 226. No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

*2 Rev. Stat., 692, § 10.*

This rule is also a restriction of the rule of the common law. By that rule the gist of conspiracy is the unlawful confederating; and the act is complete when the confederacy is made. Any act done in pursuance of it is no constituent part of the offense, but merely an aggravation of it. See *Commonwealth v. Judd*, 2 *Mass.*, 329; *State v. Rikey*, 4 *Halst.*, 293; *State v. Buchanan*, 5 *Har. & J.*, 317, 352.

So, also, it is said that where an indictment charges an ordinary conspiracy, it is not necessary to prove a common design between the defendants before proving the acts of each defendant; for the acts of each defendant are only evidence against himself, and may be the only means of establishing the conspiracy. In high treason, the overt act of one is the overt act of all; and therefore a common design must, in such cases, precede the proof of individual acts. *Reg. v. Brittain*, 11 *L. T.*, 48; 3 *Cox Cr. Cas.*, 77.

As to whether the misdemeanor of conspiracy to commit a felony is to be deemed merged in the felony when subsequently committed, see *Commonwealth v. Fisher*, 5 *Mass.*, 106; *Lambert v. People*, 9 *Cow.*, 620; *Rey v. Battton*, 3 *Cox Cr. Cas.*, 229; and 18 *L. J. M. C.*, 19.

## TITLE IX.

## OF CRIMES AGAINST THE PERSON.

- CHAPTER**
- I. Suicide.
  - II. Homicide.
  - III. Maiming.
  - IV. Kidnapping.
  - V. Attempts to kill.
  - VI. Robbery.
  - VII. Assaults with intent to commit felony other than assaults with intent to kill.
  - VIII. Duels and challenges.
  - IX. Assault and battery.
  - X. Libel.

## CHAPTER I.

## SUICIDE.

- SECTION** 227. Suicide defined.
- 228. No forfeiture imposed for suicido.
  - 229. Attempting suicide.
  - 230. Aiding suicide.
  - 231. Furnishing weapon or drug to commit suicide.
  - 232. Aiding attempt at suicide.
  - 233. Mental incapacity of person aided, no defense.
  - 234. Punishment of aiding suicide.
  - 235. Punishment of attempting suicide or aiding an attempt.

§ 227. Suicide is the intentional taking of one's <sup>Suicido  
defined.</sup> own life.

§ 228. Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed. <sup>No for-  
feiture  
imposed  
for suicido.</sup>

See 2 Rev. Stat., 701, § 22.

§ 229. But every person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which if committed upon or towards another person and followed by death as a conse- <sup>Attempt-  
ing suicido.</sup>

quence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

An attempt to commit suicide is a misdemeanor at common law. And in this, as in other cases, the mere fact of drunkenness is no excuse, if there was an actual intent on the part of the accused to take his own life. The fact is, however, material as bearing on the question of intent. *Rey v. Doody*, 6 *Cox Cr. Cas.*, 463.

**Aiding  
suicide.**

**§ 230.** Every person who willfully, in any manner, advises, encourages, abets or assists another person in taking his own life, is guilty of aiding suicide.

**Furnishing  
weapon or  
drug to  
commit  
suicide.**

**§ 231.** Every person who willfully furnishes another person with any deadly weapon or poisonous drug, knowing\*that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such person thereafter employs such instrument or drug in taking his own life.

**Aiding  
attempt at  
suicide.**

**§ 232.** Every person who willfully aids another in attempting to take his own life, in any manner which by the preceding sections would have amounted to aiding suicide if the person assisted had actually taken his own life, is guilty of aiding an attempt at suicide.

**Mental  
incapacity  
of person  
aided, no  
defense.**

**§ 233.** It is no defense to a prosecution for aiding suicide, or aiding an attempt at suicide, that the person who committed or attempted the suicide was not a person deemed capable of committing crime.

Intended to meet the possible argument in defense of one who assists the suicide of an insane person, &c., that as the principal was incapable of crime, no crime was committed by him, and therefore the abettor cannot be deemed to have assisted a crime.

**Punish-  
ment of  
aiding  
suicide.**

**§ 234.** Every person guilty of aiding suicide is punishable by imprisonment in a state prison for not less than seven years.

Corresponds with 2 *Rev. Stat.*, 661, § 7; and *Id.*, 662, § 20.

**Punish-  
ment of  
attempting**

**§ 235.** Every person guilty of attempting suicide, or of aiding an attempt at suicide, is punishable by

imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.

suicide or  
aiding an  
attempt.

## CHAPTER II.

### HOMICIDE.

**SECTION 236.** Homicide defined.

- 237. Different kinds of homicide.
- 238. What proof of death is required.
- 239. Petit treason abolished.
- 240. Effect of proof of a domestic or confidential relation.
- 241. Murder defined.
- 242. Design to effect death when inferred.
- 243. Premeditation.
- 244. Anger or intoxication no defense.
- 245. Act eminently dangerous, and evincing a depraved mind.
- 246. Duel fought out of this state.
- 247. Punishment of murder.
- 248. Manslaughter in first degree defined.
- 249. Killing unborn quick child by injury to person of mother.
- 250. By administering drugs, &c.
- 251. Punishment of manslaughter in first degree.
- 252. Manslaughter in second degree defined.
- 253. Liability of owner of mischievous animal.
- 254. Liability of persons navigating vessels.
- 255. Liability of persons in charge of steamboats.
- 256. Liability of persons in charge of steam engines.
- 257. Liability of physicians.
- 258. Liability of persons making or keeping gunpowder contrary to law.
- 259. Punishment of manslaughter in second degree.
- 260. Excusable homicide defined.
- 261. Justifiable homicide by public officers.
- 262. Justifiable homicide by other persons.

**§ 236. Homicide is the killing of one human being Homicide  
defined. by another.**

**§ 237. Homicide is either :**

Different  
kinds of  
homicide

1. Murder;
  2. Manslaughter;
  3. Excusable homicide ; or,
- Justifiable homicide.

What proof  
of death is  
required.

§ 238. No person can be convicted of murder or manslaughter, or of aiding suicide, unless the death of the person alleged to have been killed and the fact of killing by the accused, are each established as independent facts beyond a reasonable doubt.

To this extent the strict rule of the common law requiring the finding of the body as an invariable condition to a conviction for homicide has, by the latter cases, been relaxed. See *Ruloff v. People*, 18 N. Y. (4 *Smith*), 179; compare also *State of Vermont v. Davidson*, 30 *Vt.*, 377.

Petit  
treason  
abolished.

§ 239. The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife as petit treason, are abolished, and these offenses are deemed homicides, punishable in the manner prescribed by this chapter.

See 2 *Rev. Stat.*, 657, § 8. In modifying the language of the Revised Statutes upon this subject, the Commissioners have not intended any change in the law, but have simply designed to introduce such a reference to the common law as should serve to explain why any legislation upon the point was demanded.

Effect of  
proof of a  
domestic or  
confidential  
relation.

§ 240. Whenever the grade or punishment of homicide is made to depend upon its having been committed under circumstances evincing a depraved mind or unusual cruelty, or in a cruel manner, the jury may take into consideration the fact that any domestic or confidential relation existed between the accused and the person killed, in determining the moral quality of the acts proved.

Murder  
defined.

§ 241. Homicide is murder in the following cases:

1. When perpetrated without authority of law, and with a premeditated design to effect the death, of the person killed or of any other human being;
2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;

**3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony.**

*The former definition.* This section is founded on 2 Rev. Stat., 657, § 5. The definitions of the four grades of homicide given in the Revised Statutes, though drawn with care, and resulting, when attentively considered, in an accurate demarcation, are yet obscured and embarrassed with references to each other, and to the rules of the common law. The Commissioners have, in subsequent sections, recommended a modification of the law of manslaughter, distinguishing it into two degrees only, instead of four. In other respects, whenever they have departed, in these definitions of homicide, from the phraseology of the Revised Statutes, it has chiefly been in order to render each definition independent and sufficient in itself.

*Degrees in Murder.* By recent statutes (*Laws of 1860*, 712, ch. 410, § 2, and 1862, 369, ch. 197, § 5), murder was divided into two degrees, the first degree only being punishable with death. The practical result of introducing such a distinction will be that jurors influenced by unwillingness to unite in a capital conviction, will always find the prisoner guilty of the second degree only. The Commissioners are of opinion that the simplicity of the definition of murder in the Revised Statutes should be restored.

**§ 242. A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed.**

Design to effect death when inferred.

**§ 243. A design to effect death sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution.**

Premeditation.

People *v.* Clark, 7 N. Y. (3 Seld.), 385.

People *v.* Austin, 1 Park. Cr., 154.

**§ 244. Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time.**

Anger or intoxication no defense.

People *v.* Johnson, 1 Park. Cr., 291.

People *v.* Sullivan, 7 N. Y. (3 Seld.), 396.

People *v.* Austin, 1 Park. Cr., 154.

People *v.* Vinegar, 2 Id., 24.

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**Act eminently dangerous and evincing a depraved mind.**

**§ 245.** Homicide perpetrated by an act eminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others.

Intended to correct the rules deemed incorrect, laid down in *People v. Sheriff of Westchester Co.*, 1 *Park. Cr.*, 659; *Darry v. People*, 10 *N. Y.* (6 Seld.), 120.

**Duel fought out of this state**

**§ 246.** Every person who, by previous appointment within this state, fights a duel without this state, and in so doing inflicts a wound upon his antagonist or any other person, whereof the person injured dies, and every second engaged in such duel, is guilty of murder, and may be indicted, tried and convicted in any county of the state.

See 2 *Rev. Stat.*, 657, § 6.

**Punishment of murder.**

**§ 247.** Every person convicted of murder shall suffer death for the same.

Corresponds with 2 *Rev. Stat.*, 656, § 1. See notes to sections 60 and 241, above.

**Manslaughter in first degree defined.**

**§ 248.** Homicide is manslaughter in the first degree in the following cases :

1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor;
2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide;
3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

*Subd. 1.* This clause is intended to embody the provisions of 2 *Rev. Stat.*, 661, § 6.

The words "by the act, procurement or culpable negligence of another," used in that statute, are omitted. They are not found in the corresponding clause in the definition of murder. (2 *Rev. Stat.*, 657, § 5, *subd. 3*.

See also section 241, *supra*) If the accused was committing *felony* when he perpetrated the homicide, it is murder, though unintentional. If he was committing a *misdemeanor*, the homicide is manslaughter in the first degree. The sections embodying these two ideas should correspond in language. Homicide by culpable negligence is made manslaughter in the second degree, by section 252 of this Code.

The word "misdemeanor" is substituted for the phrase "crime or misdemeanor, not amounting to felony," that being the exact meaning expressed by the term misdemeanor under the definition already given in this Code.

The restriction "in cases where such killing would be murder at the common law," is omitted because it is deemed essential to the usefulness of the Code that its definitions should not be dependent upon a recourse to the common law to render them intelligible.

*Subd. 2.* This provision embodies two sections of the existing law; 2 Rev. Stat., 661, §§ 10 and 12. Both species of homicide there respectively defined as manslaughter in the second and third degrees, are here brought within the first degree, in harmony with the design of the Commissioners to simplify the law of manslaughter by reducing the number of its degrees.

*Subd. 3.* This embodies the provision of 2 Rev. Stat., 661, § 11. The phrase "to commit a crime" is substituted for "to commit any felony or to do any unlawful act," because the words "unlawful act" might be deemed to embrace trespass; yet the case of homicide of a person committing a trespass, is specifically declared manslaughter in the third degree by 2 Rev. Stat., 661, § 13.

**§ 249. The willful killing of an unborn quick child by any injury committed upon the person of the mother of such child, and not prohibited in the next following section, is manslaughter in the first degree.**

Killing  
unborn  
quick child  
by injury to  
person of  
mother.

Substituted for 2 Rev. Stat., 661, § 8, the language of which is obscure. Whether an injury to the mother resulting in death would be murder depends wholly on the intent, and not at all on the description of the injury.

**§ 250. Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever, or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to pre-**

By admin-  
istering  
drugs, &c.

## THE PENAL CODE

serve the life of such mother, is guilty, in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree.

*Laws of 1846, ch. 22, § 1.* In the final report this section and the preceding may perhaps be embodied in one.

Punish-  
ment of  
manslaugh-  
ter in first  
degree.

§ 251. Every person guilty of manslaughter in the first degree is punishable by imprisonment in a state prison for not less than four years.

Founded upon 2 *Rev. Stat.*, 662, § 20; but modified to correspond with the reduction in the number of degrees in manslaughter, introduced by the preceding provisions.

Manslaugh-  
ter in  
second de-  
gree defined

§ 252. Every killing of one human being by the act, procurement or culpable negligence of another, which under the provisions of this chapter is not murder, nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree.

Liability of  
owner of  
mischiev-  
ous animal.

§ 253. If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large or not confined, kills any human being who has taken all the precautions which the circumstances permitted, to avoid such animal, the owner is deemed guilty of manslaughter in the second degree.

See 2 *Rev. Stat.*, 662, § 14.

Liability of  
persons  
navigating  
vessels.

§ 254. Every person navigating any vessel for gain, who willfully or negligently receives so many passengers or such a quantity of other lading on board such vessel, that by means thereof such vessel sinks or is overset or injured, and thereby any human being is drowned or otherwise killed, is guilty of manslaughter in the second degree.

See 2 *Rev. Stat.*, 662, § 15.

Liability of  
persons in  
charge of  
steamboats.

§ 255. Every captain or other person having charge of any steamboat used for the conveyance of pas-

gers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking any person is killed, is deemed guilty of manslaughter in the second degree.

See 2 Rev. Stat., 662, § 16.

**§ 256.** Every engineer, or other person having charge of any steam boiler, steam engine or other apparatus for generating or employing steam, employed in any manufactory, railway or other mechanical works, who willfully or from ignorance or gross neglect creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, engine or apparatus, or to cause any other accident whereby the death of a human being is produced, is guilty of manslaughter in the second degree.

Liability of persons in charge of steam engines.

**§ 257.** Every physician who, being in a state of intoxication, without a design to effect death, administers any poison drug or medicine, or does any other act as such physician, to another person, which produces the death of such other, is guilty of manslaughter in the second degree.

Liability of physicians.

See 2 Rev. Stat., 442, § 17.

**§ 258.** Every person guilty of making or keeping gunpowder or saltpetre within any city or village, in any quantity or manner such as is prohibited by law or by any ordinance of said city or village, in consequence whereof any explosion occurs whereby any human being is killed, is guilty of manslaughter in the second degree.

Liability of persons making or keeping gunpowder contrary to law.

See *Laws of 1846*, ch. 291, § 19.

**§ 259.** Every person guilty of manslaughter in the second degree is punishable by imprisonment in a

Punishment of manslaughter.

ter in  
second  
degree.

state prison not more than four years, and not less than two years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Founded on 2 Rev. Stat., 662, § 20; but modified to correspond with the reduction in the number of degrees in manslaughter, introduced by the preceding provisions.

**Excusable  
homicide  
defined.**

**§ 260. Homicide is excusable in the following cases:**

1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent;
2. When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat; provided that no undue advantage is taken, nor any dangerous weapon used, and that the killing is not done in a cruel or unusual manner.

2 Rev. Stat., 660, § 4. The verbal alterations introduced are intended only to attain greater clearness of expression; and not to introduce any substantive changes.

**Justifiable  
homicide  
by public  
officers.**

**§ 261. Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:**

1. In obedience to any judgment of a competent court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued, or who have escaped, or when necessarily committed in arresting felons fleeing from justice.

**Justifiable  
homicide  
by other  
persons.**

**§ 262. Homicide is also justifiable when committed by any person in either of the following cases:**

1. When resisting any attempt to murder such

person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is; or,

2. When committed in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; or,

3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace.

*2 Rev. Stat., 660, § 3.*

## CHAPTER III.

### MAIMING.

#### SECTION 263. Maiming another person defined.

- 264. Maiming one's self to escape performance of a duty.
- 265. Maiming one's self to obtain alms.
- 266. What injury may constitute maiming.
- 267. What disfigurement may constitute maiming.
- 268. Designing to maim, &c.
- 269. Premeditated design.
- 270. Subsequent recovery of injured person, when a defense.
- 271. Punishment.

**§ 263.** Every person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance, or disables any member or organ of his body, or seriously diminishes his physical vigor, is guilty of maiming.

Maiming  
another  
person  
defined.

Definitions of mayhem found in several of the more familiar English authorities confine the offense to such wounds as impair the powers of attack or defense; the gravamen of the offense being deemed to consist in the disability for self protection which it creates. (Consult 4 *Blackst. Comm.*, 205, 150; 1 *Coke, Inst.*, § 502.)

Earlier authorities, however, are to be found giving the word a more extended signification. Thus, Pulton (*De Pace Regis*, 1609, fol. 15, §§ 58 and 59) says: "Mai-

"heming is when one member of the commonweale shall take from another member of the same a natural member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labor in the time of peace; and also diminisheth the strength of his bodie, and weaken him thereby to get his own lyving, and by that means the commonweale is in a sort deprived of the use of one of her members.' Wounds which merely disfigured the person without impairing the general strength or the powers of some particular member seem to have been excluded by all the common law definitions of mayhem; though made the subject of several stringent enactments. In this country, however, many of the statutes, punishing maims, embrace also wounds, deemed aggravated from the personal disfigurement involved, merely. Thus, our own statute (2 Rev. Stat., 664, § 27), without defining the term "mayhem," imposes one and the same punishment on any person who "shall cut out or disable the tongue; put out an eye; slit the lip or nose; cut off or disable any limb," &c. So the Revised Statutes of Ohio embrace biting the nose, lip or ear. (1 Rev. Stat. of Ohio, 1860, 411, § 23.) The act of congress of 1790 (1 U. S. Stat. at L., 115, § 13), specifies cutting off an ear. So in Illinois, mayhem is expressly defined to consist in unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. (1 Purple's Stat. of Ill., 365, § 47.) And there are many other statutes substantially like these, in this respect. (Compare 2 Gavin & H. Stat. of Ind., 1862, 440, § 12; 2 Rev. Stat. of Miss., 565, § 34; Pen. Code of La., 141, art. 235; 1 Md. Code, 235, § 121; Rev. Stat. of Maine, 667, § 15; Rev. Code, D. C., 517, § 20; Code of Iowa, 350, § 2577; Code of Ala., 563, § 3105; Stat. of Conn., Comp. of 1854, 307, § 12; 1 Rev. Stat. of Ky., 382, art. 6, § 1.) Following the example of these enactments, the Commissioners have extended the penalty of maiming to embrace wounding which either disables or disfigures.

**§ 264. Every person who, with design to disable himself from performing any legal duty, existing or anticipated, inflicts upon himself any injury whereby he is so disabled, is guilty of maiming.**

In countries burdened with a severe military conscription, self inflicted injuries, to escape the service, are not uncommon.

"It is curious to observe," says Foderé (*Tr. de Med. Leg.*, vol. 2, p. 480, cited in 1 *Beck's Med. Jur.*, 37) "how

many young men have, during the last twenty years, worn convex glasses, in order to acquire *myopia* or near-sightedness."

"Ulcers," says Beck (1 *Med. Jur.*, 50), "are frequently induced by the use of acetate of copper quicklime, &c.

\* \* \* Frauds of this description are frequently attempted in hospitals or to avoid the performance of labor of every kind." And he narrates several striking instances of this species of imposture.

The military law of France declares any individual drafted to perform military duty who incapacitates himself, either temporarily or permanently, punishable by imprisonment.

The extent to which practices of this sort have been carried in modern Egypt is very remarkable. Mr. Edward Lane, writing in 1834, says: "There is seldom to be found, in any of the villages, an ablebodied youth or young man who has not had one or more of his teeth broken out (that he may not be able to bite a cartridge), or a finger cut off, or an eye pulled out or blinded, to prevent his being taken for a recruit. Old women and others make a regular trade of going about from village to village to perform these operations upon the boys, and the parents themselves are sometimes the operators." (1 *Lane's Mod. Egyptians*, 3d ed., 294.)

St. John, writing in 1851 (*Village Life in Egypt*), and Warburton (*The Crescent and the Cross*), give similar accounts.

During the present war similar means are known to have been resorted to, in some instances, to avoid military service; and this suggests the insertion of the section.

**§ 265.** Every person who inflicts upon himself any injury such as if inflicted upon another would constitute maiming, with intent to avail himself of such injury, to excite sympathy, or to obtain alms, or any charitable relief, is guilty of maiming.

Maiming  
one's self  
to obtain  
alms.

**§ 266.** To constitute maiming it is immaterial by what means or instrument, or in what manner, the injury was inflicted.

What inju-  
ry may  
constitute  
maiming.

U. S. v. Scroggins, 1 *Hempst.*, 478.

Baker v. State, 4 Ark., 56, 63.

**§ 267.** To constitute maiming by disfigurement the injury must be such as is calculated, after healing, to attract observation. A disfigurement which can only

What dis-  
figurement  
may consti-  
tute malm-  
ing.

he discovered by close inspection does not constitute maiming.

*State v. Girkin*, 1 *Ired. L.*, 121.

*State v. Abram*, 10 *Ala.*, 928.

Designing  
to maim,  
&c.

§ 268. A design to injure, disfigure or disable, is inferred from the fact of inflicting an injury which is calculated to disfigure or disable, unless the circumstances raise a reasonable doubt whether such design existed.

*State v. Girkin*, 1 *Ired. L.*, 121.

*State v. Evans*, 1 *Hayw.*, 281.

*State v. Crawford*, 2 *Dev.*, 425.

Premedi-  
tated de-  
sign.

§ 269. A premeditated design to injure, disfigure or disable, sufficient to constitute maiming, may be formed instantly before inflicting the wound.

The Revised Statutes required "a premeditated design evinced, lying in wait for the purpose, or in any other manner;" or an intent to kill or commit a felony. (2 *Rev. Stat.*, 664, § 27.) As, however, the words "premeditated design," as used in the Revised Statutes, relative to murder, have been construed to embrace a design formed at the instant of the act, the Commissioners suggest the employment of them in the same sense in reference to maiming. That rule has been laid down in *State v. Simmons*, 3 *Ala.*, 497.

Subsequent  
recovery of  
injured  
person,  
when a  
defense.

§ 270. Where it appears, upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming shall be had; but the accused may be convicted of assault and battery, with or without a special intent, according to the proof.

To constitute maiming the injury should be permanent. Where, however, the prosecution have proved a wound inflicted by the prisoner, and effective at the time to disable the person injured, it is for the prisoner to show that the injury was only temporary. (*Baker v. State*, 4 *Ark.*, 56, 64.)

Punish-  
ment.

§ 271. Every person guilty of maiming is punishable by imprisonment in a state prison not exceeding

seven years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

The punishment prescribed by the Revised Statutes, for maiming, is imprisonment in a state prison, not exceeding seven years. (2 Rev. Stat., 664, § 27.) As the Commissioners have extended their definition to embrace self-inflicted injuries, they have provided for a broader range of judicial discretion, in respect to the punishment.

## CHAPTER IV.

### KIDNAPPING.

#### SECTION 272. Kidnapping defined.

- 273. Effect of consent of injured person.
- 274. Selling services of person of color.
- 275. Removing from this state persons held to service in another state.
- 276. Penalty imposed on judicial officers.

§ 272. Every person who, without lawful authority, <sup>Kidnapping defined.</sup> forcibly seizes and confines another, or inveigles or kidnaps another, with intent, either :

1. To cause such other person to be secretly confined or imprisoned in this state against his will ; or,
2. To cause such other person to be sent out of this state against his will ; or,
3. To cause such person to be sold as a slave, or in any way held to service against his will, is punishable by imprisonment in a state prison not exceeding ten years.

2 Rev. Stat., 664, § 28.

The above section embraces substantially the provisions of 2 Rev. Stat., 664, § 30, and is somewhat broader than the term "kidnapping," in the caption of the chapter, would imply. That term is, by earlier writers, used to denote the abduction of children only ; and this seems its etymological meaning. (See *Philip's World of Words*; *Webst. Dict.*; *Johns. Dict.*) Many accurate authorities employ it without respect to the age of the subject ; but confine it to an abduction committed with intent to export the person injured out from his own home, state or country, to another.

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(See *Bell's Dict. Law of Scot.*; *Bouvier's Law Dict.*; *Jacob's Law Dict.*) Thus, the Revised Statutes of Illinois (vol. 1, p. 366, §§ 54 and 55,) make false imprisonment to consist in a confinement or detention without legal authority, and confine kidnapping to the offense of abducting and sending to another country. The existing provisions of our own Revised Statutes draw no such distinction. The Commissioners have thought it best to preserve them as they now stand. In employing the term kidnapping as a caption to the chapter, they use it only as a convenient title for purposes of reference, and not as restrictive upon the definitions given of offenses prohibited.

*Particular offenses*, analogous to kidnapping, *e. g.*, abduction of females, and child stealing, are the subject of some special provisions in other chapters of this Code.

In *Hadden v. The People*, 25 N. Y., 372, it has been lately held that procuring the intoxication of a sailor with the design of getting him on shipboard, without his consent, and taking him on board in that condition is kidnapping under the Revised Statutes; and that it is immaterial whether the offender did the acts, or any of them, in person or caused them to be done.

Where the intent and expectation, in such a case, is that the seaman will be carried out of this state, the offense is complete, although the ship be not in fact, destined to leave the state.

**Effect of  
consent of  
injured  
person.**

**§ 273.** Upon any trial for a violation of the preceding section the consent of the person kidnapped or confined thereto shall not be a defense, unless it appear satisfactorily to the jury that such person was above the age of twelve years, and that such consent was not extorted by threats or by duress.

See 2 Rev. Stat., 664, § 30. The above section is deemed by the Commissioners unnecessary; but as it is found in the existing law, and embodies a principle clearly correct, they have hesitated to omit it, lest a change in the law should seem to have been intended. They have inserted the words "that such person was above the age of twelve years;" believing that the consent of a child under that age, however freely given, should not operate as a defense.

*Punishment of accessaries.* Section 31, of 2 Rev. Stat., 665, providing that every person convicted as an accessory to any kidnapping or confinement hereinbefore prohibited is punishable by imprisonment in a state prison, not exceeding six years, or in a county jail, not exceeding one year, or by a fine, not exceeding five hundred dollars,

or by both such fine and imprisonment, is omitted. The Commissioners have preferred to leave the punishment of accessories in kidnapping to the operation of the general provision relative to accessories, in section 30.

**§ 274.** Every person who, within this state or elsewhere, sells or in any manner transfers, for any term, the services or labor of any black, mulatto, or other person of color, who has been forcibly taken or inveigled, or kidnapped from this state, is punishable by imprisonment in a state prison not exceeding ten years.

Selling services of person of color.

See 2 Rev. Stat., 665, § 32. The words "within this state or elsewhere" are added. It was held in *People v. Merrill*, 2 Park. Cr., 590, that, under the Revised Statutes, no prosecution could be maintained where the sale was effected out of the state. The Commissioners are of opinion that in conformity to the views relative to the jurisdiction of the state over offenders who being out of the state, co-operate in the commission of an offense within it, which have been embodied in section 15 of this Code, one who, in another state, consummates the kidnapping of a person from this state, by selling him as a slave, may be held amenable to the penal justice of this state, if afterwards found within the jurisdiction of our courts.

*Limit of punishment.* The Revised Statutes contain an additional clause, allowing imprisonment in a county jail, or fine, to be imposed. The commissioners have omitted this clause; considering the offense deserving of imprisonment in a state prison, in all cases.

**§ 275.** Every person claiming that he or another is entitled to the services of a person alleged to be held to labor or service in a state or territory of the United States who, except as authorized by Title V, of the Code of Criminal Procedure, takes or removes or willfully does any act tending towards removing from this state any such person, is guilty of felony, punishable by imprisonment in the state prison not exceeding ten years, and by a penalty of five hundred dollars, recoverable in a civil action by the party aggrieved.

Removing from this state persons held to service in another state.

**§ 276.** Every judge, or other public officer of this state who grants or issues any warrant, certificate or

Penalty imposed on judicial officers.

other process in any proceeding for the removal from this state of any person claimed as held to labor or service in a state or territory of the United States, except in pursuance of the provisions of Part VI, Title V, of the Code of Criminal Procedure, is guilty of a misdemeanor; and in addition to the punishment therefor prescribed by law, he forfeits five hundred dollars to the party aggrieved, recoverable in a civil action.

Embodying the provisions of *Rep. Code Cr. Pro.*, §§ 910, 923. On comparing the provisions reported by the commissioners of practice and pleadings and which were founded on former provisions of the Revised Statutes, it will be observed that while a *judge or other public officer* who issues process for the removal of a fugitive, except as permitted by the Code of Criminal Procedure, is punishable by the penalties of *misdemeanor* the *claimant* of the fugitive who does any act towards his removal is guilty of felony, and may be punished by imprisonment extending to ten years. The commissioners do not consider this one of those extreme cases which justify the infliction of a penalty upon a judicial officer for an act in the nature of a judicial decision. They are of opinion that the above section should be omitted and the offenses specified, if flagrant enough to demand punishment should be left to the remedy by impeachment. If, however, a criminal penalty is to be inflicted upon the judge at all, the propriety of making so marked a distinction between the punishment to be inflicted upon the claimant and that prescribed for the judge is doubtful.

## CHAPTER V.

### ATTEMPTS TO KILL.

#### SECTION 277. Administering poison.

- 278. Shooting and assault and battery with deadly weapons.
- 279. Other assaults with intent to kill.

Shooting,  
and assault  
and battery  
with deadly  
weapons.

§ 277. Every person who with intent to kill, administers or causes or procures to be administered to another any poison which is actually taken by such other, but by which death is not caused, is punishable by imprisonment in a state prison not less than ten years.

Founded on 2 *Rev. Stat.*, 666, § 37.

§ 278. Every person who shoots or attempts to shoot at another, with any kind of fire arms, air gun or other means whatever, with intent to kill any person, or who commits any assault and battery upon another by means of any deadly weapon, and by such other means or force as was likely to produce death, with intent to kill any other person, is punishable by imprisonment in a state prison not exceeding ten years.

Adminis-  
tering  
poison.

This section embraces so much of 2 *Rev. Stat.*, 665, § 36, as relates to attempts to kill; assaults, &c., in attempt to commit other felonies are embraced by a subsequent chapter.

*Intent to kill a third person.* The language of section 36 of 2 *Rev. Stat.*, 655, above cited,—“any person who shall be convicted \* \* \* of any assault and battery upon another \* \* \* with the intent to kill, &c., such other person,”—seems to require, in order to warrant a conviction, that the accused should have intended a felony on the very individual assaulted. A broader rule is recommended by the commissioners in view of the following adjudications. The person was indicted for wounding Y, with intent to murder him. It appeared that he shot at Y supposing him to be M, and intending to murder M; *Held* he was properly convicted of wounding Y, with intent to murder him. He intended to murder the man at whom he shot. *Reg. v Smith, 1 Jur., N. S.*, 1116; 25 *Law J. (M. C.)*, 29.

On a trial for assault and battery with intent to kill, it appeared that the prisoner being pursued by two officers, attempting to arrest him, fired a pistol in the direction of both, and so near as to endanger both. He intended to harm at least one; but was regardless which he might harm, his object being to prevent an arrest. *Held*, that he might be convicted on an indictment charging him with an assault on two. *Commonwealth v. McLaughlin, 12 Cush.*, 615.

The defendant fired into a crowd with intent to kill some one, and A was wounded. *Held*, that this was enough to establish an assault and battery upon A, with intent to kill. *Walker v. State, 8 Ind.*, 290.

But an intent to kill some particular person must be shown. *Reg. v. Lallement, 6 Cox Cr. Cas.*, 204.

And where a woman jumped out of a window for the purpose of avoiding violence threatened by her husband, and sustained a dangerous bodily injury, it was held that the husband could not be convicted of an attempt to murder, unless he intended, by his conduct, to make her jump from the window. *Reg. v. Donovan, 4 Cox Cr. Cas.*, 400.

**Other  
assaults  
with intent  
to kill.**

**§ 279.** Every person who is guilty of an assault with intent to kill any person, the punishment for which is not prescribed by the foregoing section, is punishable by imprisonment in a state prison for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Embraces so much of 2 *Rev. Stat.*, 666, § 39, as relates to assaults with intent to kill.

## CHAPTER VI.

### ROBBERY.

#### SECTION 280. Robbery defined

- 281. How force or fear must be employed.
- 282. Degree of force immaterial.
- 283. What fear may be an element in robbery.
- 284. Value of property taken, immaterial.
- 285. Taking of property secretly, not robbery.
- 286. Two degrees of robbery.
- 287. Punishment of robbery in first degree.
- 288. Punishment of robbery in second degree.
- 289. Punishment of robbery committed by two or more persons.

**Robbery  
defined.**

**§ 280.** Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

This definition embodies substantially the elements suggested by 2 *Rev. Stat.*, 677, §§ 55, 56; the word "wrongfully" being substituted for "feloniously." Three elements are necessary to constitute the offense of robbery, as it is generally understood. 1. A taking of property from the person or presence of its possessor. 2. A wrongful intent to appropriate it. 3. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simple larceny. The first and third, without the second, amount at most to a trespass. The second and third, without the first, constitute an attempt to rob. These elements are kept in view in the provisions upon robbery; and offenses not presenting all are excluded from this chapter, and covered by other provisions of the Code.

For the distinctions between robbery, larceny, extortion, embezzlement, and those cases of taking of personal property which amount only to trespass, see notes upon the subjects of larceny and extortion.

**§ 281. To constitute robbery the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery.**

How force or fear must be employed.

This provision conforms to the existing law, as established by the Revised Statutes. It has been held, indeed, that violence employed to get possession of the property does not constitute robbery; to have this effect the force must be employed to prevent or overpower resistance. *State v. John.*, 5 *Jones N. C. Law Rep.*, 163; *Rex v. Gnosil*, 1 *Corr. & P.*, 304; *Rex v. Baker, Leach.*, 290; *R. v. Homer, Leach*, 291, n. The Commissioners believe, however, it will be found the safer rule to punish the taking as robbery where it is accomplished by force, against an actual dissent of the owner's will. This will exclude secret stealing from the person; such as picking the pocket, and other cases in which, though an indefinitely small force is used in removing the property, it is done without the owner's knowledge.

**§ 282. When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial.**

Degree of force immaterial.

In an English case, it appeared that the prisoner struck the prosecutor's hand so as to cause money in it to fall to the ground, and then picked up the money himself, using threatening violence to prevent the prosecutor from doing so. *Held*, robbery if the taking by the prisoner was committed while the owner of the money still remained present. *Rex v. Francis*, 2 *Strange*, 1015.

In a case in Rhode Island it appeared that the prisoner put one of his hands through the arm of the prosecutor, and with the other seized the latter's watch; saying, "I will have your watch;" and, breaking the watch guard, fled with the watch. *Held*, robbery, on the ground, the taking was by *force*. The expressed determination made the case one of *open* violence, as distinguished from a secret taking or mere snatching by surprise. *State v. McCune*, 5 *R. I.*, 60.

**§ 283. The fear which constitutes robbery may be either:**

What fear may be an element in robbery.

1. The fear of an unlawful injury, immediate or future, to the person or property of the person robbed, or of any relative, of his, or member of his family ; or,
2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed, at the time of the robbery.

Founded upon the provisions of 2 Rev. Stat., 677, §§ 55, 56; but extended to embrace the case of a theft accomplished by means of a threat of immediate violence towards a *companion* of the person deprived of property, who is not, however, a relative or member of his family; and, also, the case of theft accomplished by means of a threat of a future injury to the *property* of a relative of the person robbed, or of a member of his family.

Value of  
property  
taken im-  
material.

**§ 284.** When property is taken under the circumstances required to constitute robbery, the fact that the property was of trifling value does not qualify the offense.

In *Rex v. Bingley*, 5 Carr. & P., 602, the property taken was a slip of paper containing a memorandum of a debt due to the person robbed. It was held that the offense was robbery notwithstanding the small value of the paper. That the prosecutor showed, by carrying the memorandum in his pocket, that he considered it of some value.

Taking of  
property  
secretly not  
robbery.

**§ 285.** The taking of property from the person of another is not robbery, when it clearly appears that the taking was fully completed without his knowledge.

Two de-  
grees of  
robbery.

**§ 286.** Robbery when accomplished by the use of force or of putting the person robbed in fear of some immediate injury to his person, is robbery in the first degree. When accomplished in any other manner it is robbery in the second degree.

Corresponds with the distinction established by 2 Rev. Stat., 677 and 678, §§ 55, 56.

Punish-  
ment of  
robbery in  
first degree.

**§ 287.** Every person guilty of robbery in the first degree is punishable by imprisonment in a state prison not less than ten years.

2 Rev. Stat., 678, § 57.

**§ 288.** Every person guilty of robbery in the second degree is punishable by imprisonment in a state prison not exceeding ten years.

Punish-  
ment of  
robbery in  
second de-  
gree.

\* 2 Rev. Stat., 678, § 57.

**§ 289.** Whenever two or more persons conjointly commit a robbery, or where the whole number of persons conjointly committing a robbery, and persons present and aiding such robbery amount to two or more, each and either of such persons is punishable by imprisonment for life.

Punish-  
ment of  
robbery  
committed  
by two or  
more per-  
sons.

Intended as a stringent provision against "garroting" and other forms of robbery by gangs. The language of the section is framed upon that of section 391 of the *Indian Penal Code*.

## CHAPTER VII.

### ASSAULTS WITH INTENT TO COMMIT FELONY OTHER THAN ASSAULTS WITH INTENT TO KILL.

**SECTION 290.** Shooting and assaults with deadly weapons.

291. Other assaults.

292. Administering stupefying drugs.

**§ 290.** Every person who shoots or attempts to shoot at another with any kind of fire-arms, air-gun, or other means whatever, or commits any assault and battery upon another by means of any deadly weapon or by such other means or force as was likely to produce death, with intent to commit any felony other than an assault with intent to kill, or in resisting the execution of any legal process, is punishable by imprisonment in a state prison not exceeding ten years.

Shooting  
and as-  
saults with  
deadly  
weapons.

Embraces so much of 2 Rev. Stat., 665, § 36, as is not already covered by the provisions of sections 278, *supra*, relative to attempts to kill.

**§ 291.** Every person who is guilty of an assault with intent to commit any felony, except an assault with intent to kill, the punishment for which assault is not prescribed by the preceding section, is punish-

Other as-  
saults.

able by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Embraces so much of 2 Rev. Stat., 666, § 39, as is not embraced by the provisions of section 279, *supra*, relative to attempts to kill.

Administering stu-  
pefying  
drugs.

§ 292. Every person guilty of administering to another any chloroform, ether, laudanum or other intoxicating, narcotic or anesthetic agent, with intent thereby to enable or assist himself or any other person to commit any felony, is guilty of felony.

See Consol. Stat. of Canada, 955, § 13.

## CHAPTER VIII.

### DUELS AND CHALLENGES.

**SECTION 293. Duel defined.**

- 294. Punishment for fighting a duel.
- 295. Incapacity to hold office.
- 296. Punishment of seconds, aids, and surgeons.
- 297. Punishment for challenges.
- 298. Challenge defined.
- 299. Attempts to induce a challenge.
- 300. Posting for not fighting.
- 301. Leaving the state with intent to evade laws against dueling.
- 302. Where such person may be indicted and tried.
- 303. Witness's privilege.

Duel de-  
fined.

§ 293. A duel is any combat, with deadly weapons, fought between two persons by previous agreement or upon a previous quarrel.

Punish-  
ment for  
fighting a  
duel.

§ 294. Every person guilty of fighting any duel, although no death or wound ensues, is punishable by imprisonment in a state prison not exceeding ten years.

Founded on 2 Rev. Stat., 686, § 1.

Incapac-  
ity to hold  
office.

§ 295. Every person convicted of fighting a duel is thereafter incapable of holding or being elected or

appointed to any office, place or post of trust or emolument, civil or military, under this state.

*2 Rev. Stat., 686, § 4.*

§ 296. Every person who is present at the time when any duel is fought, either as second, aid or surgeon, or who advises or gives any countenance to any duel, is punishable by imprisonment in a state prison not exceeding seven years.

Punish-  
ment of  
seconds,  
aids, and  
surgeons.

*2 Rev. Stat., 686, § 2.*

§ 297. Every person who challenges another to fight a duel; every person who accepts any such challenge; and every person who knowingly forwards, carries or delivers any such challenge, is punishable by imprisonment in a state prison not exceeding seven years.

Punish-  
ment for  
challenges.

Founded on *2 Rev. Stat., 686, § 2.*

§ 298. Any words, spoken or written, or any signs, uttered or made to any person, expressing or implying or intended to express or imply a desire, request, invitation or demand, to fight a duel, or to meet for the purpose of fighting a duel, are deemed a challenge.

Challenge  
defined.

See *State v. Perkins*, 6 *Blackf.*, 20; *Commonwealth v. Tibbs*, 1 *Dana*, 524.

§ 299. Every person guilty of sending, uttering or making to another any words or signs whatever, with intent to provoke or induce such person to give or receive any challenge to fight a duel, is guilty of a misdemeanor.

Attempts to  
induce a  
challenge.

So held in *King v. Philips*, 6 *East.*, 464; upon the ground that as sending a challenge is a misdemeanor (as to which see *Rex v. Rice*, 3 *East.*, 581,) any act done with intent to cause one to be sent is a misdemeanor.

§ 300. Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written or printed, to or concerning another, for not sending or

Posting for  
not fighting.

**accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.**

Founded upon 2 Rev. Stat., 694, § 20.

*Leaving the state with intent to evade laws against dueling.*

**§ 301. Every person who leaves this state with intent to elude any of the provisions of this chapter, and to commit any act out of this state, such as is prohibited by this chapter, and who does any act, although out of this state, which would be punishable by said provisions, if committed within this state, is punishable in the same manner as he would have been, in case such act had been committed within this state.**

Founded upon 2 Rev. Stat., 686, § 5. Under that provision the prosecution might be required to prove the sending a challenge in order to warrant a conviction. The Commissioners have extended the provision so that proof of any act, in aid of a duel, will be sufficient.

*Where such person may be indicted and tried.*

**§ 302. Such person may be indicted and tried in any county within this state**

*Witness's privilege.*

**§ 303. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.**

Intended as a substitute for 2 Rev. Stat., 686, § 3.

## CHAPTER IX.

### ASSAULT AND BATTERY.

**SECTION 304. Assault defined.**

305. Battery defined.

306. Use of force or violence declared not unlawful in certain cases.

307. Punishment of assault or assault and battery.

308. Assaults with dangerous weapons, &c.

**§ 304.** An assault is any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another.

Assault  
defined.

See *Hays v. People*, 1 *Hill*, 351; 2 *Bish. Cr. L.*, § 32; 3 *Blackst. Comm.*, 120.

*Intent to strike.* An assault has also been said to be an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional*. If there is no present purpose to do an injury, there is no assault. There must also be an *attempt*. A purpose not accompanied by an effort to carry it into immediate execution falls short of an assault. Thus no words can amount to an assault. But rushing towards another with menacing gestures and with a *purpose to strike* is an assault, though the accused is prevented from striking before he comes near enough to do so. *State v. Davis*, 1 *Ired. (N. C.)*, 121.

But mere threatening gestures unaccompanied by such a purpose, although sufficient to cause a man of ordinary firmness to believe he was about to be struck, do not constitute an assault. Thus, when the defendant shook his whip at the prosecutor, saying, at the same time: "if you were not an old man I would knock you down." *Held*, no assault, unless the jury should be satisfied that there was a present purpose to strike. *State v. Crow*, 1 *Ired. (N. C.)*, 375. To the same effect is *Commonwealth v. Eyre*, 1 *Serg. & R.*, 347.

So where an ambassador exhibited a painting in the window of his house which gave offense to the crowd without, and defendant, among the crowd, fired a pistol at the painting at the very time when the ambassador and his servants were in the window to remove it, but did not intend to hurt any of them, and in fact did not. *Held*, that there being no intent to injure the person there could be no conviction for an assault. *U. S. v. Hand*, 2 *Wash. C. C.*, 435.

But threatening another with a weapon, as a means of coercing him to yield to a demand, intending to strike if he refuses, but not to strike if he complies, is an assault, although the other party negotiates and no blow is finally given. It makes no difference that the purpose to commit violence is not absolute but only conditional. *State v. Morgan*, 3 *Ired. (N. C.)*, 186.

And, in general, it is an assault to present a pistol which purports to be loaded at another person, so near as would endanger life if it were fired, although the pistol is not, in fact, loaded. *State v. Smith*, 2 *Humph.*, 457. *Rex v. Parfait, Lach.*, 23; *East. P. C.*, 416; *Rex v. Thomas, Lach.*, 272; *East. P. C.*, 417; also, *Morgan v. State*, 33 *Ala.*, 413, where it is held that the presenting a pistol loaded and cocked, although with the finger on the trig-

ger, and in an angry manner, does not of itself raise a presumption of an intent to murder, but is a common assault.

*Consent.* In general, if the party suffering the violence has consented to it, there is no assault. Thus, although a child of tender years cannot legally consent to a rape upon her, yet she may consent to an attempt to commit it; and such an attempt, if committed with her consent, is not an assault. *Rey v. Cockburn*, 3 *Cox Cr. Cas.*, 543; *Rey v. Read*, 2 *Carr. & K.*, 957; 3 *Cox Cr. Cas.*, 266; 1 *Den. C. C.*, 377; *Rex v. Wehegan*, 7 *Cox Cr. Cas.*, 145.

But there must be actual consent. Mere omission to resist is not enough. *Reg. v. McGavaran*, 6 *Cox Cr. Cas.*, 64.

And where a medical man to whom a girl of fourteen years of age was sent for professional advice had criminal connection with her, she making no resistance, from a *bona fide* belief that the defendant was treating her medically, as he represented he was doing. *Held*, he was properly convicted of an assault, and might have been of rape. *Reg. v. Case*, 4 *Cox Cr. Cas.*, 220; 1 *Den. C. C.*, 580.

Battery  
defined.

§ 305. A battery is any willful and unlawful use of force or violence upon the person of another.

Use of force  
or violence  
declared  
not unlaw-  
ful in cer-  
tain cases.

§ 306. To use or attempt or offer to use force or violence upon or towards the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of any legal duty; or by any other person assisting him or acting by his direction;
2. When necessarily committed by any person in arresting one who has committed any felony, and delivering him to a public officer competent to receive him in custody;
3. When committed either by the party about to be injured or by any other person in his aid or defense, in preventing or attempting to prevent an offense against his person, or any trespass or other unlawful interference with real or personal property in his lawful possession; provided the force or violence used is not more than sufficient to prevent such offense;
4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or

teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar; provided restraint or correction has been rendered necessary by the misconduct of such child, ward, apprentice or scholar, or by his refusal to obey the lawful command of such parent, or authorized agent or guardian, master or teacher, and the force or violence used is reasonable in manner and moderate in degree;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from any carriage, railroad car, vessel or other vehicle, any passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers; if such vehicle has first been stopped and the force or violence used is not more than is sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

6. When committed by any person in preventing an idiot, lunatic, insane person or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health; during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

*Subd. 2.* Supported by *People v. Adler*, 3 *Park. Cr.*, 249; *People v. Wolven*. 7 *N. Y. Leg. Obs.*, 89; *People v. McArdle*, 1 *Wheel. Cr.*, 101.

*Subd. 3.* Corresponds with the provisions relative to resistance to prevent offenses, reported in *Rep. Code Cr. Pro.*, §§ 60-62; except that the provision has been enlarged to embrace resistance to trespasses upon real property.

*Subd. 4.* It was held in *Hernandez v. Carnobeli* (4 *Duer*, 642; S. C., 10 *How. Pr.*, 433), that the authorized agent of a father was not liable to a civil action for assault and battery for force necessarily used in conveying a son from this country back to his father in Cuba. But, in *People v. Philips* (1 *Wheel. Cr.*, 155), it was held that the right

of a master to chastise his apprentice is strictly personal, the master cannot direct or permit another person to chastise the apprentice for any offense whatever. In the light of these cases the Commissioners have drafted the section in the text in such a form as to recognize the right of a parent, whether father or mother, to delegate the power to restrain, and also the power to chastise, if indeed it is considered that any distinction exists between the two, while the similar power of a guardian or teacher is placed upon the same ground with that of the master of an apprentice. Upon this subject the general rule is that when a teacher, inflicting punishment upon his pupil, goes beyond the limit of moderate castigation, and either in mode or degree is guilty of unreasonable or disproportionate violence, he is liable to a prosecution for assault and battery. And it is not necessary to show actual passion or vindictive feeling. The criminal intent is inferred from the nature of the act. *Commonwealth v. Randall*, 4 *Gray*, 36.

*Subd. 5.* See *People v. Jillson*, 3 *Park. Cr.*, 234; *Hibbard v. New York & Erie R. R. Co.*, 15 *N. Y.*, 455. In *Sanford v. Eighth Avenue R. R. Co.* (23 *N. Y.*, 243), it was said that the right to expel a passenger from a railroad car cannot be exercised without first stopping the car. Though the language used in the opinion seems more directly applicable to cars propelled by steam, yet as the car, in the particular case before the court, was a city railroad car, drawn by horses, the Commissioners have regarded the condition that the vehicle or carriage must be stopped before the offending passenger can be ejected as applicable in all cases.

As to whether, after the refusal of a passenger to produce his ticket or pay his fare, on alighting from a railway carriage, he can be compelled to proceed by train to the principal station on the line, to be there dealt with by the authorities of the company, see *Reg. v. Mann*, 6 *Cox Cr. Cas.*, 461; S. C., 23 *L. T.*, 12.

Punish-  
ment of  
assault or  
assault and  
battery.

**§ 307. Assault or assault and battery is punishable by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.**

This is an increase in severity of punishment as compared with that inflicted under the existing laws. The frequency and aggravation of instances of violence to the person which have been observed during the past few years require that a more stringent punishment be affixed to the offense.

Assaults  
with dan-  
gerous wea-  
pons, &c.

**§ 308. Every person who, with intent to do bodily harm, and without justifiable or excusable cause,**

commits any assault upon the person of another with any sharp or dangerous weapon, or who without such cause shoots or attempts to shoot at another with any kind of fire-arms, or air-gun or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year.

See *Laws of 1854*, ch. 74, § 1.

## CHAPTER X.

### LIBEL.

#### SECTION 309. Libel defined.

- 310. Libel a misdemeanor.
- 311. Malice presumed.
- 312. Truth may be given in evidence.
- 313. Publication defined.
- 314. Liability of editors and others.
- 315. Publishing a true report of public official proceedings privileged.
- 316. Extent of the privilege.
- 317. Other privileged communications.
- 318. Threatening to publish a libel.

**§ 309.** Any malicious injury to good name, other than by words orally spoken, is a libel. Libel defined.

Corresponds with the definition given in *Dr. Civ. Code*, § 22.

**§ 310.** Every person who willfully, and with a malicious intent to injure another, publishes any libel is guilty of a misdemeanor. Libel a misdemeanor.

**§ 311.** An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. Malice presumed.

**§ 312.** In all criminal prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true and was published with Truth may be given in evidence.

good motives and for justifiable ends, the party shall be acquitted.

*Const. of 1846, art. 1, § 8.*

Publication defined.

§ 313. To sustain a charge of publishing a libel it is not needful that the words complained of should have been read by any person. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read by any other person than himself.

*Giles v. The State, 6 Ga., 276.*

Liability of editors and others.

§ 314. Each author, editor, and proprietor, of any book, newspaper or serial publication, and each member of any partnership or incorporated association, by which any book, newspaper, or serial publication is issued, is chargeable with the publication of any words contained in any part of said book, or number of such newspaper or serial.

Compare *Rex v. Gutch*, 1 *Moo. & M.*, 433; *Commonwealth v. Kneeland, Thach. Cr. C.*, 846.

Publishing a true report of public official proceedings privileged.

§ 315. No reporter, editor or proprietor of any newspaper, is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice, in making such report, which shall in no case be implied from the mere fact of publication.

*Laws of 1854, ch. 130, § 1.*

In *Sanford v. Bennett* (24 *N. Y.*, 20), the question was whether a speech made by a convict at the place of execution was a speech made in the course of a judicial or public official proceeding, within the meaning of the statute, so that one publishing it was protected by the statute from a civil action for injurious words contained in it, concerning other persons. The court decided the question in the negative. They held that the statute applied only to judicial and legislative proceedings, and to transactions resembling them, such as the transactions of administrative boards, in which the subjects dealt with are liable to be considered, deliberated upon, discussed and determined, and not to an executive act to be performed by a single person and admitting of no deliberation, and it protects only the publication of speeches

which form properly a part of the proceeding; not those which occur incidentally while it is progressing, but are not required and cannot influence it. The act of 1854 having thus received a judicial construction, the Commissioners have substantially followed its language.

**§ 316. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected.**

Extent of the privilege.

See *Laws of 1854*, ch. 130, § 2.

**§ 317. A communication made to a person interested in the communication by one who was also interested or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is called a privileged communication.**

Other privileged communications.

*Dr. Civ. Code, § 25.*

**§ 318. Every person who threatens to another to publish a libel concerning him or any parent, husband, wife or child of such person or member of his family, is guilty of a misdemeanor.**

Threatening to publish a libel.

The Commissioners have intentionally confined this section to the case of threats uttered directly to the person about to be libeled. The ground upon which the criminal remedy for libel is allowed, is the tendency of a libel to provoke a breach of the peace. When a threat to publish one is addressed to the person to be libeled, the tendency of the threat is nearly as dangerous as the actual publication would be. But a threat to publish a libel uttered to third persons, and only reaching the injured party through indirect repetition, is after all no more calculated to create disturbance of the peace than other forms of slander; and should not be distinguished from slander in the remedy allowed.

## TITLE X.

OF CRIMES AGAINST THE PERSON AND AGAINST  
PUBLIC DECENCY AND GOOD MORALS.

- CHAPTER**
- I. Rape, abduction, carnal abuse of children, and seduction.
  - II. Abandonment and neglect of children.
  - III. Abortions and concealing death of infant.
  - IV. Child stealing.
  - V. Bigamy, incest and the crime against nature.
  - VI. Violating sepulture and the remains of the dead.
  - VII. Indecent exposures, obscene exhibitions, books and prints, and disorderly houses.
  - VIII. Lotteries.
  - IX. Gaming.
  - X. Pawnbrokers.

## CHAPTER I.

RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN,  
AND SEDUCTION.

- SECTION**
- 319. Rape defined.
  - 320. When physical ability must be proved.
  - 321. Penetration sufficient.
  - 322. Rape in the first degree defined.
  - 323. Rape in the second degree defined.
  - 324. Punishment of rape in the first degree.
  - 325. Punishment of rape in the second degree.
  - 326. Compelling woman to marry.
  - 327. Taking a woman with intent to compel her to marry or to be defiled.
  - 328. Seduction for purposes of prostitution.
  - 329. Abduction.
  - 330. Seduction under promise of marriage.
  - 331. Subsequent marriage a defense.

Rape de-  
fined.

§ 319. Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances :

- 1. Where the female is under the age of ten years;
- 2. Where she is incapable, through lunacy or any

other unsoundness of mind, whether temporary or permanent, of giving legal consent;

3. Where she resists, but her resistance is overcome by force or violence;

4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution;

5. Where she is prevented from resisting by any intoxicating, narcotic or anesthetic agent administered by or with the privity of the accused;

6. Where she is at the time unconscious of the nature of the act, and this is known to the accused;

7. Where she submits under a belief that the person committing the act is her husband; and this belief is induced by any artifice, pretense or concealment, practised by the accused, with intent to induce such belief.

This section is an extension of the generally received definition of rape. East defines this offense to be "the unlawful carnal knowledge of a woman by force and against her will." (1 *East. P. C.*, 434.) Blackstone defines it in the same language, omitting the word "unlawful." (4 *Blackst. Comm.*, 210.) And this is believed to be substantially the definition given by the leading writers on criminal law, except that some of the later decisions indicate a disposition to substitute the idea "without her consent" for "against her will." (See *Reg. v. Camplin*, 1 *Cox Cr. Cas.*, 220; 1 *Den. C. C.*, 89; 1 *Carr. & K.*, 746; *Reg. v. Sweenie*, 8 *Cox Cr. Cas.*, 223; 3 *Irvine*, 159.)

Our own Revised Statutes, in lieu of any formal definition of the crime, provide that: "Every person who shall be convicted of rape, either: 1. By carnally and unlawfully knowing any female child under the age of ten years; or, 2. By forcibly ravishing any woman of the age of ten years or upwards; shall be punished," &c. (2 *Rev. Stat.*, 663, § 22.)

The Commissioners have designed to present a definition which should expressly include the various instances which have been adjudged to constitute the offense, with some others which have been held not to fall within the limited definition of the common law authorities, but to which the same penalties ought to be extended.

*Subd.* 1. This provision embodies the well settled rule of the existing law; that a girl under ten years of

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age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape. Consult 2 *Rev. Stat.*, 663, § 22, subd. 1; quoted, *supra*, *Stephen v. State*, 11 *Ga.*, 225; *State v. Farmer*, 4 *Ired.*, 224; 4 *Blackst. Comm.*, 212.

*Subd. 2.* It is probable that an act of intercourse with a woman above the age of ten years, but mentally incapable of giving legal consent, would be held to be "forcibly ravishing," within the meaning of subdivision 2 of 2 *Rev. Stat.*, 663, § 22, quoted *supra*. The question is not known to have arisen in the courts of our state. In England it has been held that under the statute, 13 *Edw. I.*, c. 34,—which provides that if a man \* \* do ravish a woman \* \* when she did not consent, neither before nor after, he shall, &c.,—forcible intercourse with a female incapable, through imbecility of mind, of giving legal consent, is rape; although she was above ten years of age, and offered no resistance. (*Reg. v. Fletcher*, 8 *Cox Cr. Cas.*, 131; 5 *Jur. N. S.*, 179.) See, also, in support of the same principle, *Rex v. Ryan*, 2 *Cox Cr. Cas.*, 115; *State v. Cron*, 10 *West. L. J.*, 501; McNamara's case, *Oakley*, 521. Believing that, under the existing law, an insane female stands in the same position, in respect to this offense, with a child under ten, the Commissioners have embodied a statement of that rule in the section.

*Subd. 3 and 4.* These embrace the ordinary cases of the offense, and require no special remark. As to resistance overcome by force, see *Charles v. State*, 6 *Engl.*, 389; *State v. Jim*, 1 *Den.*, 142; *Pollard v. State*, 2 *Clarke*, 567; *Myatt v. State*, 2 *Swan.*, 394; *Lewis v. State*, 30 *Ala.*, 54; *State v. Blake*, 39 *Me.*, 322; *Barney v. People*, 22 *Ill.*, 160. As to resistance overcome by fear, see *Pleasant v. State*, 8 *Engl.*, 360; *Reg. v. Hallett*, 9 *Carr. & P.*, 748; *Reg. v. Day*, *Id.*, 722; *Wright v. State*, 4 *Humph.*, 194.

*Subd. 5.* This provision is intended to cover cases where the female is rendered temporarily incapable of giving consent by means of liquors or drugs; and embraces the cases now covered, though not under the name of rape, by the provisions of 2 *Rev. Stat.*, 663, § 23.

In *Reg. v. Camplin*, 1 *Cox Cr. Cas.*, 220; 1 *Den. C. C.*, 89; 1 *Carr. & K.*, 746; the jury found that the prisoner gave liquor to the female for the purpose of exciting her passions and inducing her consent; it had, however, the effect of rendering her drunk and insensible; in which condition he violated her. This was held to be rape; on the ground that the connection was accomplished *without* the consent and against the will of the female, which was all that was necessary to constitute the offense. Actual resistance on her part was not necessary to be shown.

A number of similar instances of the commission of

the offense are referred to in *Wharton & St. Med. Jur.*, §§ 441-443.

The Commissioners do not limit this provision to cases in which the stupefying drug is administered with intent to facilitate a rape. Cases in which the drug is administered from proper motives, but the accused afterwards avails himself of the helplessness of the subject to commit the offense are designed to be included. It is indeed doubtful whether, in the case of *Reg. v. Camplin*, above cited, a conviction would have been sustained independent of the circumstances, upon which some stress is laid by members of the court, that the liquor was given with an unlawful intent, and that the prosecutrix indicated dissent by refusing the prisoner's solicitations as long as she had the power. But a comparatively recent and familiar trial in which it was charged that advantage was taken of helplessness induced by the administration of chloroform, shows the possibility of a case arising in which the stupefying drug may have been originally given for a lawful purpose, and no indication of dissent given by the female for the reason that there was no previous solicitation, nor was any violence apprehended by her; and the offense may be an afterthought, suggested by the opportunity. Such a case ought to be embraced within the law.

*Subd. 6.* It can but rarely happen that the subject of the offense consciously submits to the act uncomelled, without being aware of its nature; yet some cases of this sort are reported.

In *Reg. v. Case* (4 *Cox Cr. Cas.*, 220), the defendant was a medical practitioner, and the prosecutrix was a young girl placed under his care for medical treatment. She made no resistance to the connection owing to a belief, from representations of defendant, that she was submitting to medical treatment for the ailment under which she labored. *Held*, upon an indictment for assault, that the accused was rightly convicted. Her submission to the act under an impression that it was something necessary to her case was not such a consent as relieved the defendant from criminal responsibility.

Whether it is to be regarded as possible that a connection should be accomplished during the unconsciousness of natural sleep, without arousing the female, is said to be an open question in medical jurisprudence. (See *Beck's Med. Jur.*, 7th ed., 117; *Tayl. Med. Jur.*, 5th ed., 654; *Whart. & St. Med. Jur.*, 336, §§ 440, 441; *Montgomery on Pregnancy*, 2d ed., p. 361; *Bundelius*, 96, 99.) Whether an unlawful connection so accomplished should be deemed, if proved, to amount to rape has been differently decided by the courts. (See *Reg. v. Sweenie*, 8 *Cox Cr. Cas.*, 223; 3 *Irvine*, 159, in the affirmative, and *Fields* case, 4 *Leigh*, 648; *Charles v. State*, 6 *Engl.*, 389, in the negative. It has not been

thought best on a review of the authorities to specify this as one of the cases embraced. The danger of giving rise to unjust prosecutions in cases where the sleep was merely simulated, is to be weighed against that of the commission of the offense where the sleep is genuine.

*Subd. 7.* Several cases are to be found in the reports, in which a criminal connection has been accomplished by means of personating the husband of the female. In England this is held not to be rape. (*Reg. v. Clarke, Dearsly*, 397; 6 *Cox. Cr. Cas.*, 412; 18 *Jur.*, 1059; 29 *Eng. L. & Eq.*, 542; *Rex v. Jackson, Russ & Ry.*, 437; *Reg. v. Williams*, 8 *Carr & P.*, 286; *Reg. v. Saunders, id.*, 265. In Scotland it has been held to be rape. *Fraser's case, Arkley*, 329; *Reg. v. Sweenie*, 8 *Cox Cr. Cas.*, 223. In this country the question has been differently decided in the different states. See *Wyatt v. State*, 2 *Swan*, 394; *Lewis v. State*, 30 *Ala.*, 54; *People v. Bartow*, 1 *Wheel. Cr. Cas.*, 378; following the English view; and *State v. Shepard*, 7 *Conn.*, 54; *Anon.*, 1 *Wheel. Cr. Cas.*, 381, note adopting the contrary.

Without reviewing the reasoning of these cases, or questioning the soundness of the English decisions considered as exposition of the existing law, the commissioners think that this offense fully partakes of the guilt of rape, and should share its punishment in all instances in which any means are used by the accused to create a belief that he is the husband.

When physical ability must be proved.

**§ 320. No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged; unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.**

Many of the authorities lay down the rule as conclusive that incapacity is to be presumed when the accused is under 14 years of age (See 2 *Bish. Cr. L.*, § 936). In *People v. Randolph*, 2 *Park. Cr.*, 174; and *Williams v. State*, 14 *Ohio*, 222, the presumption has been held capable of being rebutted by proof of actual capacity in the individual.

As by our existing law, penetration is declared sufficient to constitute the offense (2 *Rev. Stat.*, 735, § 18), it seems consistent that the special proof of power to commit the crime, required in the case of a boy under 14, should be adduced to that point though this is probably a severer rule than is contemplated by the decisions above cited.

Penetration sufficient.

**§ 321. The essential guilt of rape consists in the outrage to the person and feelings of the female.**

Any sexual penetration, however slight, is sufficient to complete the crime.

See 2 Rev. Stat., 735, § 18; Robertson's Case, 1 Swint., 98.

**§ 322. Rape committed upon a female under the age of ten years, or incapable through lunacy or any other unsoundness of mind of giving legal consent, or accomplished by means of force overcoming her resistance, is rape in the first degree.**

Rape in the first degree defined.

**§ 323. In all other cases rape is of the second degree.**

Rape in the second degree defined.

**§ 324. Rape in the first degree is punishable by imprisonment in a state prison not less than ten years.**

Punishment of rape in the first degree.

See 2 Rev. Stat., 663, §§ 22, 23.

**§ 325. Rape in the second degree is punishable by imprisonment in a state prison not less than five years.**

Punishment of rape in the second degree.

*Ibid.*

**§ 326. Every person who takes any woman against her will, and by force, menace or duress compels her to marry him or to marry any other person, is punishable by imprisonment in a state prison not less than ten years.**

Compelling woman to marry.

See 2 Rev. Stat., 663, § 24. The language of the Revised Statutes is, "Every person who shall take any woman *unlawfully*, against her will, and by force menace or duress compel her to marry him or to marry any other person, *or to be defiled*," &c. The commissioners have omitted the words "or to be defiled," because the offense of taking a woman and by force compelling her to be defiled is covered by the provisions of section 319, defining rape, taken in connection with section 27, which abrogates the distinction between principals and accessories before the fact, and declares persons who aid and abet in the commission of a crime, principals. And they have omitted the word "*unlawfully*," because there is no case in which a woman can be lawfully taken and compelled to marry. But in the next section the language of the Revised Statutes is retained because the taking of a woman *with intent* to cause her to be defiled, is not em-

braced in the crime of rape; which requires an act of penetration.

Taking a woman with intent to compel her to marry or to be defiled.

**§ 327.** Every person who takes any woman unlawfully against her will, with the intent to compel her by force, menace or duress to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in a state prison not exceeding ten years.

See 2 *Rev. Stat.*, 663, § 25. The commissioners have substituted "not exceeding ten years" for "not less than than ten years," which is the existing law, in order that the mere taking a woman with the intent to commit a rape under circumstances which would only constitute rape in the second degree, may not be necessarily punishable more severely than such rape would be, by section 325.

Seduction for purposes of prostitution.

**§ 328.** Every person who inveigles or entices any unmarried female of previous chaste character under the age of twenty-five years, into any house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution ; and every person who aids or assists in such abduction for such purpose, is punishable by imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Founded upon Laws of 1848, ch. 105.

*Omitted provisions.* The further provisions of the act of 1848, that no conviction shall be had upon the unsupported testimony of the female enticed away, is here omitted for the reason that it belongs to the subject of evidence. See the provisions already reported upon that subject, *Rep. Code Civ. Pro.*, Part IV.

So much of the act of 1848, above cited as provides that indictments for the offense of enticing away females for the purpose of prostitution, must be found within two years after the commission of the offense, is already embodied in *Rep. Code Cr. Pro.*, § 141.

Abduction.

**§ 329.** Every person who takes away any female under the age of sixteen years, from her father, mother, guardian or other person having the legal charge of her person, without their consent, either for the purpose of marriage, concubinage or prostitution

is punishable by imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Founded upon 2 *Rev. Stat.*, 664, § 26. The limit of age being varied from 14 years to 16.

Under the analogous English statute, 9 Geo. IV, ch. 31, § 20, it has been held not to be necessary that the girl should be taken by force, either actual or constructive, or be taken out of the actual possession of the parent or guardian. It is enough if she be persuaded by the prisoner to leave her home, and the control of the parent continues down to the time of the taking. Where, therefore, the prisoner persuaded a girl under sixteen to meet him at a place two miles from her father's house, where she lived, for the purpose of going with him to America, and did so voluntarily, leaving her home alone, then meeting the prisoner at the place appointed, and afterwards traveling with him to London: *Held*, that he was guilty of abduction. Reg. *v.* Monkelow, 6 *Cox Crim. Cas.*, 143; 22 *L. J. M. C.*, 115, S. P., Reg. *v.* Kipps, 4 *Cox Cr. Cas.*, 167; Reg. *v.* Frazer, 8 *id.*, 446.

So it has been held that the statute was satisfied, though the prisoner and the female quitted the house together in consequence of a proposition which emanated from the girl herself to that effect, and a statement by her to the prisoner that she intended to leave her father's house. Reg. *v.* Biswell, 2 *Cox Cr. Cas.*, 279.

So where it was proved that the prisoner (with whom the girl had previously stayed out for a night), met her by arrangement, and stayed with her away from her father's house for three days, sleeping with her at night, that he took her away without the father's consent in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away from her home permanently, it was held that the evidence justified a conviction under the above enactment. Reg. *v.* Timmons, 8 *Cox Cr. Cas.*, 401.

But where it did not appear that the prisoner had any improper motive, the jury were directed that if they thought the prisoner merely wished to have the child to live with him, and honestly believed that he had a right to the custody of the child although he had no such right, they ought to acquit him. Reg. *v.* Tinkler, 1 *Fost. & F.*, 513.

As to what is to be deemed a person "having the legal charge of her person," in the case of an orphan child, over whom no guardian has been appointed, see State *v.* Ruhl, 8 *Clarke*, 447.

Seduction  
under pro-  
mise of  
marriage.

§ 330. Every person who, under promise of marriage, seduces and has illicit connection with any unmarried female of previous chaste character, is punishable by imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Founded upon *Laws of 1848*, ch. 111, § 1; the punishment being modified to correspond with that prescribed for the analogous offenses specified in the two sections preceding.

*Omitted provisions.* The further provision of the statute cited that no conviction shall be had upon the unsupported testimony of the female seduced is here omitted for reason that it belongs to the subject of evidence. See the provisions already reported upon that subject. *Rep. Code Civ. Pro.*, Part IV.

So much of the act of 1848, above cited as provides that indictments for seduction must be found within two years after the commission of the offense, is already embodied in *Rep. Code Cr. Pro.*, § 141.

*"Promise of Marriage."* As to what promise is sufficient. See *People v. Alger*, 1 *Park. Cr.*, 333; *Crozier v. People*, *Id.* 453; *State v. Bierce*, 27 *Conn.*, 319.

*"Seduced," &c.* The words "and has illicit connection with," are retained for the reason they are found in the existing statute; and it is desired to avoid implying any change in the law in this respect. But the words quoted are probably unnecessary. The word "seduce," when used in such a statute and with reference to conduct of a man towards a woman, has been held to describe the offense sufficiently. *State v. Bierce*, 27 *Conn.*, 319.

*"Unmarried Female."* That the condition of the female as unmarried, is an element of the offense, under statutes of this description, and must be proved by the government. See *West v. State*, 1 *Wisc.*, 209.

*"Previous Chaste Character."* Character here is to be distinguished from reputation; in which sense the word is often used, even in our statutes (*e. g.*, *Code of Pro.*, § 179, subd. 1 and 5). Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. Character is interior; reputation external. Character is the substance of the individual; reputation is the shadow. The word is used in this statute, and in the similar provisions embodied in section 328, in its strict and proper sense; and requires that the female should actually *be*, not merely that she should have been *reputed* to be of personal virtue

up to the time of the seduction by defendant. *Carpenter v. People*, 8 *Barb.*, 603; *Safford v. People*, 1 *Park. Cr.*, 474; See also *Andre v. State*, 5 *Clarke*, 389; *Boak v. State*, *Id.*, 430.

**§ 331.** The subsequent marriage of the parties is a defense to a prosecution for a violation of the last section. Subsequent  
marriage a  
defense.

See *Laws of 1848*, ch. 111.

## CHAPTER II.

### ABANDONMENT AND NEGLECT OF CHILDREN.

**SECTION 332.** Deserting child.

333. Omitting to provide child with necessaries.

**§ 332.** Every parent of any child under the age of six years, and every person to whom any such child has been confided for nurture or education, who deserts such child in any place whatever, with intent wholly to abandon it, is punishable by imprisonment in a state prison not exceeding seven years, or in a county jail not exceeding one year. Deserting  
child.

See 2 *Rev. Stat.*, 665, § 35.

**§ 333.** Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon him by law to furnish necessary food, clothing, shelter, or medical attendance for such child, is guilty of misdemeanor. Omitting to  
provide  
child with  
necessaries.

See *Dr. Civ. Code*, §§ 77, 84, 87, for provisions reported defining the duty of parental support. As to the criminality of willful omission to perform this duty. See *Reg. v. Chandler*, 1 *Jur. N. S.*, 429; 25 *Law T.*, 133; *Reg. v. Gray*, 7 *Cox Cr. Cas.*, 326; 3 *Jur. N. S.*, 989; *Reg. v. S*, 5 *Cox Cr. Cas.*, 279; *Reg. v. Philpott*, 6 *Id.*, 140.

## CHAPTER III.

## ABORTIONS AND CONCEALING DEATH OF INFANT.

SECTION 334. Administering drugs with intent to procure miscarriage.

335. Submitting to attempt to procure miscarriage.

336. Concealing still birth or death of infant.

Adminis-  
tering  
drugs with  
intent to  
procure  
miscarriage

§ 334. Every person who administers to any pregnant woman, or prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in a state prison not exceeding three years or in a county jail not exceeding one year.

See *Laws of 1845*, ch. 260, § 2.

That it is not necessary to prove that the medicine was actually taken, see *State v. Murphy*, 3 *Dutch.*, 112. Nor that the prisoner was present when it was taken. *Reg v. Wilson*, 1 *Dears. & B.* 127; 37 *Eng. L. & Eq.*, 605; *Reg v. Farrow*, 40 *Eng. L. & Eq.*, 550. Compare also *Reg v. Fretwell*, 9 *Cox Cr. Cas.*, 152.

Submitting  
to attempt  
to procure  
miscarriage

§ 335. Every woman who solicits of any person any medicine, drug or substance whatever, and takes the same, or who submits to any operation or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See *Laws of 1845*, ch. 260, § 3. The offense of wilfully killing an unborn quick child is covered by provisions in the chapter upon HOMICIDE.

The exception "unless the same is necessary to preserve her life," is found in *Laws of 1846*, ch. 22, § 1. See section 250, *supra*. And is introduced in this and the preceding section in order that the analogous provisions may correspond.

§ 336. Every woman who endeavors either by herself or by the aid of others to conceal the still birth of any issue of her body, which if born alive would be a bastard, or the death of any such issue under the age of two years, is punishable by imprisonment in a county jail not exceeding one year or by a fine not exceeding one thousand dollars, or by both.

Concealing  
still birth  
or death of  
infant.

See *Laws of 1845*, ch. 260, § 4.

As to the evidence requisite to support an indictment for concealing the birth of a child, see Reg. *v.* Bird, 2 *Carr. & K.*, 817; Reg. *v.* Goode, 6 *Id.*, 318; Reg. *v.* Berriman, *Id.*, 388; Reg. *v.* ——, *Id.*, 391; Reg. *v.* Perry, *Id.*, 531; 24 *L. J. (2 B.)*, 137; Reg. *v.* Opie, 8 *Cox Cr. Cas.*, 332.

## CHAPTER IV.

### CHILD STEALING.

SECTION 337. Definition and punishment of child stealing.

§ 337. Every person who maliciously, forcibly or fraudulently takes or entices away any child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child, is punishable by imprisonment in a state prison not exceeding ten years or by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Definition  
and punish-  
ment of  
child steal-  
ing.

2 *Rev. Stat.*, 665, § 34. The words "takes or entices," away are substituted for "leads, takes or carries away, or decoys or entices away," merely for greater conciseness, and not to introduce any change in the law.

## CHAPTER V.

## BIGAMY, INCEST AND THE CRIME AGAINST NATURE

- SECTION 338. Bigamy defined.  
 339. Exceptions.  
 340. Punishment of bigamy.  
 341. Other unlawful marriages.  
 342. Incest.  
 343. Crime against nature.  
 344. Penetration sufficient.

Bigamy  
defined.

§ 338. Every person who, having been married to another who remains living, marries any other person, except in the cases specified in the next section, is guilty of bigamy.

See 2 *Rev. Stat.*, 687, § 8. *Modification of the law.* The language of the Revised Statutes is: "Every person having a husband or wife living, who shall marry any other person," &c. Under this phraseology it was held that notwithstanding the exception in next section, which provided that the previous section should not extend to any person by reason of any former marriage which had been dissolved for some cause other than the adultery of such person, a person who married again after a divorce pronounced for his or her own adultery, was not guilty of bigamy. A divorced person, it was held could not be said to have a "husband or wife living" within the meaning of section 8, of 2 *Rev. Stat.*, 687; • *People v. Hovey*, 5 *Barb.*, 117.

On viewing together all the provisions of the existing law of marriage, divorce and bigamy the Commissioners believe it to be the clear intention of the legislature that where a divorce is granted for adultery, the innocent party only should be set free to marry again, and that the guilty one should remain incapable of marrying and liable to punishment for bigamy if he assumes so to do. They have, therefore modified the language of the provision so as to avoid the possibility of the rule laid down in *People v. Hovey*, being applied.

It may be added that the reasoning in *People v. Hovey* which was decided in the supreme court in 1849, is shaken by the decision of the court of appeals in 1850, in *Wait v. Wait*, 4 *Const.*, 95. In that case it was held that a woman who had been granted a divorce from her husband for his adultery is entitled, notwithstanding, to dower on his estate, after his death; under the language

of 1 *Rev. Stat.*, 740, § 1, viz.: "A widow shall be endowed," &c.

Except perhaps for the rule that penal statutes are to be strictly construed it would seem indisputable that if a woman so divorced were to be deemed to become the *widow* of her former husband at his death so as to entitle her to dower, she must be held to have remained his *wife*, notwithstanding the divorce, during his lifetime, so as to render his subsequent marriage bigamy. But the language employed in the text, will, it is believed, avoid all question upon the subject.

*What is proof of marriage.* What is to be deemed a marriage is left to the operation of the rules of law governing that relation. It is generally understood that a marriage in fact must be proved, and that mere proof of reputation is not enough. In a recent case in the court of Appeals this rule and its limit, were carefully considered. In that case the prosecution to establish the fact of a recent marriage, called a witness who testified in substance that the prisoner conducted her to a house where he had taken rooms. The prisoner went out and returned with a person represented to be a minister. He was dressed like one, and had on a white neck-tie. She did not ask his name. The marriage ceremony was then performed by this person. He used the form of marriage of the Protestant Episcopal Church. He inquired of the witness if she would take the prisoner for her husband, and she replied in the affirmative; and the prisoner was asked if he would have her for his wife, and upon his replying affirmatively, the minister declared them man and wife. The person officiating gave her a certificate, using a partly printed form, and filling in the blanks by writing. The certificate was taken by the prisoner, and put in his trunk, and was afterwards seen by a sister of the witness, when the parties were living together as man and wife. This marriage ceremony was followed by cohabitation, which continued for about a year. *Held*, that even if to constitute a valid marriage, it must be solemnized by a minister or magistrate, the evidence was sufficient *prima facie*, to prove a marriage in fact. A person appeared in the character of a clergyman, performed the ceremony, and it was followed by cohabitation. If the person officiating was not a clergyman, it was for the prisoner to show that fact. 12 *Vt.*, 396; 10 *East*, 282. But in this state there may be a valid marriage, though not formally solemnized by a clergyman or consent declared before a magistrate. If parties competent to contract, in the presence of witnesses, agree together to be husband and wife, and afterwards cohabit and recognize each other as such, it is a sufficient marriage to sustain an indictment for bigamy in the event of one of the parties having before that time married another, who is

still living. It was not an error therefore for the judge to instruct the jury, that if the prisoner and the witness agreed, in the presence of the man represented to be a minister, to be man and wife, and afterwards lived together as such, that was, in the eye of the law, a sufficient marriage to sustain an indictment for bigamy; the fact that the prisoner had, before that time, married Sarah E. Blair, and she was then living, being admitted; and that it was of no consequence whether the man represented to be a minister was such or not. Marriage in this state is a civil contract, and does not require the intervention of a minister or magistrate to make it legal. *Hayes v. People*, 25 N. Y., 390.

Whether the prisoner's confession that his first wife was living when he contracted the second marriage is sufficient evidence, see *Reg. v. Flaherty*, 2 *Carr. & K.*, 782; *Laugtry v. State*, 30 *Ala.*, 536; *Gorman v. State*, 23 *Tex.*, 646.

**Exceptions.** § 339. The last section does not extend :

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living ; nor,
2. To any person by reason of any former marriage whose husband or wife by such marriage has absented himself or herself from his wife or her husband and has been continually remaining without the United States for the space of five years together ; nor,
3. To any person by reason of any former marriage which has been pronounced void, annulled or dissolved by the judgment of a competent court, unless such marriage was dissolved upon the ground of adultery committed by such person ; nor,
4. To any person by reason of any former marriage with a husband or wife who has been sentenced to imprisonment for life.

Founded upon 2 *Rev. Stat.*, 687, § 9.

*Subd.* 1. What proof of the defendant's *knowledge* that the former husband or wife was living when the second marriage was contracted, is proper, depends upon the facts of each case. *Reg. v. Ellis*, 1 *Fost. & F.*, 309.

Where the prisoner was indicted for bigamy, and no evidence was given on either side as to the prisoner's knowledge that his wife was alive, but it was proved that

they had separated by agreement in 1843, and that in 1857 the prisoner produced her at a trial in which he was interested; *Held*, that it was for the jury to say whether there was an absence of knowledge on the part of the prisoner that his wife was alive in 1855, the date of the second marriage. *Reg. v. Cross*, 1 *Fost. & F.*, 510.

Upon a trial for bigamy, where it appeared that the first husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage, the jury being asked to consider whether she knew her husband to be alive at the time of the second marriage; and, if not, whether she had had the means of acquiring the knowledge: found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge, if she had chosen to make use of them: *Held*, that upon that finding the conviction could not be sustained, inasmuch as it left it uncertain whether, in fact, she had or had not the knowledge. *Reg. v. Briggs*, 7 *Cox Crim. Cas.*, 175.

That express proof that the former husband or wife was living is not always required, but strong presumption of continued life may suffice. See *Gorman v. State*, 23 *Tex.*, 646.

*Subd. 3* In order to attain greater conciseness, and to render the provisions of the text conformable to the nomenclature respecting proceedings in courts of justice introduced by the Code of Procedure, subdivision 3 in the text is substituted for the following subdivisions of the section as it stands in the Revised Statutes:

“3. To any person by reason of any former marriage which shall have been dissolved by the decree of a competent court for some cause other than the adultery of such person; nor,

“4. To any person by reason of any former marriage which shall have been pronounced void by the sentence or decree of any competent court on the ground of nullity of the marriage contract; nor,

“5. To any person by reason of any former marriage contracted by such person, within the age of legal consents, and which shall have been annulled by the decree of a competent court.”

*Place of trial.* The substance of the provisions of 2 *Rev. Stat.*, 688, § 10, declaring bigamists triable in the county where apprehended as well as in the county where the offense was committed has been embodied in *Rep. Code Cr. Pro.*, § 135.

**§ 340. Every person guilty of bigamy is punishable by imprisonment in a state prison not exceeding five years.**

Punish-  
ment of  
bigamy.

See 2 *Rev. Stat.*, 687, § 8.

Other unlawful marriages.

§ 341. Every person who knowingly marries the husband or wife of another, in any case in which such husband or wife would be punishable according to the foregoing provisions, is punishable by imprisonment in a state prison not exceeding five years or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

See 2 *Rev. Stat.*, 688, § 11. That provision, as now in force, applies only to *unmarried* persons; the idea being, doubtless, that a married person who knowingly marries the husband or wife of another, is punishable for the higher offense of bigamy, by reason of his or her own previous marriage. But to sustain a prosecution for bigamy the people must be prepared to prove the first marriage of the accused. A case might arise in which a married person contracting a marriage with a husband or wife of another might escape an indictment for bigamy for want of evidence of an earlier marriage, and yet, if indicted under section 11 of 2 *Rev. Stat.*, 688, defeat the prosecution by proof of such earlier marriage. The Commissioners have, therefore, omitted the word "unmarried." It may be remarked that by a subsequent section it is provided that where an act or omission is made punishable in different ways by different provisions of this Code, it may be punished under either of said provisions, but not under more than one. Therefore, under the above sections, as reported by the Commissioners, a person supposed to be married, and charged with marrying the husband or wife of another may be indicted either for bigamy under section 338, or for the felony prohibited by section 341, according as it may be easiest to prove the former marriage of the accused or that of the person with whom the accused has now intermarried.

Incest.

§ 342. Persons who, being within the degrees of consanguinity within which marriages are, by section 30 of the Civil Code, declared incestuous and void, intermarry with each other, or commit adultery or fornication with each other, are punishable by imprisonment in a state prison not exceeding ten years.

*2 Rev. Stat., 688, § 12.*

Crime against nature.

§ 343. Every person who is guilty of the detestable and abominable crime against nature, committed with

mankind or with a beast, is punishable by imprisonment in a state prison not exceeding ten years.

*2 Rev. Stat., 689, § 20.*

**§ 344.** Any sexual penetration, however slight, is sufficient to complete the crime against nature. Crime  
against  
nature.

*See 2 Rev. Stat., 735, § 18.*

## CHAPTER VI.

### VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD.

**SECTION 345.** Right to direct disposal of one's own body after death.

- 346. Duty of burial.
- 347. Burial in other states.
- 348. Dissection when allowed.
- 349. Unlawful dissection a misdemeanor.
- 350. Remains after dissection must be buried.
- 351. Dead limb or member of a human body.
- 352. Who are charged with duty of burial.
- 353. Punishment for omitting to bury.
- 354. Who entitled to custody of a body.
- 355. Unlawful removal of or interference with the bodies of the dead.
- 356. Purchasing corpses forbidden.
- 357. Unlawful interference with places of burial.
- 358. Removal from one burial place to another.
- 359. Arresting or attaching a dead body.
- 360. Disturbing funerals.
- 361. Defacing tombs, monuments, &c.
- 362. Unlawful dissection.

**§ 345.** Every person has the right to direct the manner in which his body shall be disposed of after his death; and to direct the manner in which any part of his body which becomes separated therefrom during his lifetime shall be disposed of. The provisions of this chapter do not apply where such person has given directions for the disposal of his body or any part thereof inconsistent with those provisions.

Right to  
direct dis-  
posal of  
one's own  
body after  
death.

**§ 346.** Except in the cases in which a right to dissect a dead body is expressly conferred by law, every

Duty of  
burial.

dead body of a human being lying within this state must be decently buried within a reasonable time after the death.

**Burial in other states**

§ 347. The last section does not affect the right to carry the dead body of a human being through this state, or to remove from this state the body of a person dying within it, for the purpose of burying the same in another state.

**Dissection, when allowed.**

§ 348. The right to dissect the dead body of a human being exists in the following cases:

1. In the cases defined in section 845 of the Political Code;
2. Whenever the death occurs under circumstances in which a coroner is authorized by law to hold an inquest upon the body, and a coroner authorizes such dissection for the purposes of the inquest;
3. Whenever any husband or next of kin of a deceased person, being charged by law with the duty of burial, authorizes such dissection for the purpose of ascertaining the cause of death.

**Unlawful dissection a misdemeanor.**

§ 349. Every person who makes or causes or procures to be made any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased, is guilty of a misdemeanor.

**Remains after dissection must be buried.**

§ 350. In all cases in which a dissection has been made, the provisions of this chapter, requiring the burial of a dead body, and punishing interference with or injuries to a dead body, apply equally to the remains of the body dissected, as soon as the lawful purposes of such dissection have been accomplished.

**Dead limb or member of a human body.**

§ 351. All provisions of this chapter requiring the burial of a dead body, or punishing interference with or injuries to a dead body, apply equally to any dead limb or member of a human body, separated therefrom during lifetime.

§ 352. The duty of burying the body of a deceased person devolves upon the persons hereinafter specified:

Who are charged with duty of burial.

1. If the deceased were a married woman the duty of burial devolves upon her husband;
2. If the deceased were not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within this state, and possessed of sufficient means to defray the necessary expenses;
3. If the deceased left no husband, nor kindred, answering the foregoing description, the duty of burial devolves upon the coroner conducting an inquest upon the body of the deceased, if any such inquest is held, if none, then upon the persons charged with the support of the poor in the locality in which the death occurs;
4. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified; and if all omit to act, it devolves upon the tenant, or, if there is no tenant, upon the owner of the premises, or master, or, if there is no master, upon the owner of the vessel in which the death occurs or the body is found.

§ 353. Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law, who omits to perform that duty within a reasonable time, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead, treble the expenses incurred by the latter in making the burial, to be recovered in a civil action.

Punish-  
ment for  
omitting  
to bury.

§ 354. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the cases in which an inquest is required by law to be held upon a dead body, by a

Who enti-  
tled to cus-  
tody of a  
body.

coroner, such coroner is entitled to its custody until such inquest has been completed.

Unlawful removal of or interference with the bodies of the dead.

§ 355. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried or from any place where the same is deposited while awaiting burial, with intent to sell the same, or to dissect it without authority of law, or from malice or wantonness, is punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

This section embraces the provisions of 2 *Rev. Stat.*, 688, § 13, extended so as to embrace the case of removing a part only of the remains of a deceased person, and also to embrace the case of removal of remains while yet unburied. In Reg. *v.* Sharpe (40 *Eng. L. & Eq.*, 581), it appeared that the prisoner had, without leave, entered a burying ground, and without authority from the custodians, had disinterred a corpse, and removed it. The removal was conducted in a proper manner, the corpse was that of the prisoner's mother, and his motive for the removal was to bury her remains in a church-yard with the body of his father, then recently deceased. *Held*, that the disinterment was a misdemeanor. The mere fact that the defendant acted from praiseworthy motives, was no defense. Neither does the English law recognize the right of any one child to the corpse of its parent. It recognizes no property in a corpse. Nor will relationship justify the taking of a corpse away from the grave where it has been buried.

The present statute of this state, however, from which the section in the text is taken, has regard to the motives from which the act is done. The Commissioners have adhered to this principle; leaving a disinterment to pass without criminal punishment if the unworthy motives specified in the section are not proved to have actuated the defendant, and if there was nothing in the manner of performing it, amounting to an offense under other provisions of the Code.

Purchasing corpses for bidden.

§ 356. Every person who purchases, or who receives, except for the purpose of burial, any dead body of a human being, knowing that the same has been removed contrary to the last section, is punishable by

imprisonment in a state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

*See 2 Rev. Stat., 688, § 14.*

§ 357. Every person who opens any grave or other place of burial, temporary or otherwise, or who breaks open any building wherein any dead body of a human being is deposited while awaiting burial, with intent, either:

*Unlawful  
interfer-  
ence with  
places of  
burial.*

1. To remove any dead body of a human being for the purpose of selling the same, or for the purpose of dissection ; or,
2. To steal the coffin, or any part thereof, or anything attached thereto, or connected therewith, or the vestments or other articles buried with the same,

Is punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding six months, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.

*2 Rev. Stat., 688, § 15.*

§ 358. Whenever a cemetery or other place of burial is lawfully authorized to be removed from one place to another, the right and duty to disinter, remove and rebury the remains of bodies there lying buried, devolves upon the persons named in section 352, in the order in which they are there named ; and, if they all fail to act, then upon the lawful custodians of the place of burial so removed. Every omission of such duty is punishable in the same manner as other omissions to perform the duty of making burial are made punishable by section 353.

*Removal  
from one  
burial place  
to another.*

§ 359. Every person who arrests or attaches any dead body of a human being upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

*Arresting  
or attach-  
ing a dead  
body.*

*Disturbing  
funerals.*

§ 360. Every person who willfully disturbs, interrupts or disquiets any assemblage of people met for the purpose of any funeral; or who, without authority of law, obstructs or detains any persons engaged in carrying or accompanying any dead body of a human being to a place of burial, is guilty of a misdemeanor.

*Defacing  
tombs,  
monu-  
ments, &c.*

§ 361. Every person who willfully defaces, breaks, destroys or removes any tomb, monument or grave-stone erected to any deceased person, or any memento or memorial, or any ornamental plant, tree or shrub appertaining to the place of burial of a human being, without authority from the owner of the soil, and husband or wife, or if there be no husband or wife, then from the next of kin of the deceased, is guilty of a misdemeanor.

*Unlawful  
dissection.*

§ 362. Every person who violates any of the provisions of sections 845, 846, or 847 of the Political Code, relative to dissection, is guilty of a misdemeanor.

## CHAPTER VII.

### INDECENT EXPOSURES, OBSCENE EXHIBITIONS, BOOKS AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES.

**SECTION 363.** Indecent exposures, exhibitions, pictures, &c.

364. Seizure of indecent articles authorized.

365. Their character to be summarily determined.

366. Their destruction.

367. Keeping bawdy house.

368. Keeping disorderly house.

369. Letting building for unlawful purposes.

*Indecent  
exposures,  
exhibitions,  
pictures, &c*

§ 363. Every person who, willfully and lewdly, either :

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels or assists any person so to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts ; or,

3. Writes or composes, stereotypes, prints, publishes, sells, distributes, or keeps for sale, or exhibits any obscene or indecent writing, paper or book, or designs or copies, draws or engraves, paints, or otherwise prepares any obscene or indecent picture or print of any description, or moulds, cuts, casts, or otherwise makes any obscene or indecent figure, or form,

Is guilty of a misdemeanor.

*Subd. 1.* It has been held in England that an omnibus, in which are several passengers, is a "public place," within the rule on this subject. Reg. v. Holmes, 21 *Law T.*, 160; 22 *Law J. (M. C.)*, 122; but that a urinal, although established for public convenience, and situated in an open market is not one. Reg. v. Orchard, 3 *Cox Cr. Cas.*, 248.

An exposure to *one* person only, is not sufficient to constitute the offense. Reg. v. Watson, 2 *Cox Cr. Cas.*, 376; Reg. v. Webb, 1 *Den. C. C.*, 338; 3 *Cox Cr. Cas.*, 183.

*Subd. 3.* That procuring and keeping indecent prints for the purpose of exhibiting or selling them is a misdemeanor; but procuring or keeping them without such intent is not—see Dugdale v. Queen, 1 *El. & B.*, 435; 20 *Law T.*, 219.

**§ 364.** Every person who is authorized or enjoined to arrest any person for a violation of subdivision 3 of the last section, is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print or figure found in possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

Seizure of  
indecent  
articles  
authorized.

Provisions regulating the issuing and execution of search warrants, applicable to cases, among others, where it is desired to discover property which is in possession of any person with intent to use it as the means of com-

mitting a public offense, are reported, *Code Cr. Pr.*, §§ 862, 883.

Their character to be summarily determined.

§ 365. The magistrate to whom any obscene or indecent writing, paper, book, picture, print or figure, is delivered pursuant to the foregoing section, shall, upon the examination of the accused, or, if the examination is delayed or prevented, without awaiting such examination, determine the character of such writing, paper, book, picture, print or figure, and if he finds it to be obscene or indecent he shall cause the same to be destroyed, or to be delivered to the district attorney of the county in which the accused is liable to indictment or trial, as the interests of justice in his judgment require. But not more than two copies of any one writing, paper, book, picture, print or figure, shall be delivered to the district attorney.

Their de-  
struction.

§ 366. Upon the conviction of the accused such district attorney shall cause any writing, paper, book, picture, print or figure, in respect whereof the accused stands convicted and which remains in the possession or under the control of such district attorney, to be destroyed.

Keeping bawdy house.

§ 367. Every person who keeps any bawdy house, house of ill-fame, of assignation, or of prostitution, or any other house or place for persons to visit for unlawful sexual intercourse or for any other lewd, obscene or indecent purpose, is guilty of a misdemeanor.

Keeping disorderly house.

§ 368. Every person who keeps any disorderly house, or any house of public resort by which the peace, comfort or decency of the immediate neighborhood is habitually disturbed, is guilty of a misdemeanor.

*2 Bish. Cr. L., § 251.*

Letting building for unlawful purposes.

§ 369. Every person who lets any building or portion of any building knowing that it is intended to be used for any purpose declared punishable by this chapter, or who otherwise permits any building or

portion of any building to be so used, is guilty of a misdemeanor.

See 2 *Rev. Stat.*, 702, § 29; *Abrahams v. State*, 4 *Iowa*, 541; *State v. Abrahams*, 6 *Clarke*, 117.

## CHAPTER VIII.

### LOTTERIES.

#### SECTION 370. "Lottery" defined.

- 371. Lottery declared a public nuisance.
- 372. Setting up lotteries.
- 373. Selling lottery tickets.
- 374. Buying lottery tickets.
- 375. Advertising lotteries.
- 376. Offering property for disposal dependent upon the drawing of any lottery.
- 377. Lottery offices.
- 378. Advertising lottery offices.
- 379. Insuring lottery tickets, &c.
- 380. Advertising offers to insure lottery tickets.
- 381. Property offered for disposal in lotteries, forfeited.
- 382. Letting building for lottery purposes.
- 383. Lotteries out of this state.
- 384. Advertisements by persons out of the state.

§ 370. A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised or agreed to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share of, or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance ; whether called a lottery, a raffle, or a gift enterprise, or by whatever name the same may be known.

See 1 *Rev. Stat.*, 665, § 22; Governor of Alms House *v. American Art Union*, 7 *N. Y.*, 228; *Bouvier's Law Dict.*, tit. Lottery; *Mass. Gen. Stat.*, 823, § 1. In the popular use of the above mentioned terms a lottery is a distribution by chance of *several* prizes among purchasers of separate chances: a raffle is a disposal by chance of a *single* prize among purchasers of separate chances; and a gift enterprise is a disposal of property in mass to a body of shareholders, upon an understanding or expectation that they will decide it among themselves by chance.

But as all schemes of this description are involved in a common coidemnation and punishment, the retaining of these distinctions in the statute book will serve no important purpose in defining the offense, while it will embarrass prosecutions by suggesting questions as to the requisite averments in the indictment. The Commissioners have, therefore, defined the word "lottery" broadly enough to cover all these homogeneous devices, in order that that word may be intelligibly used as including all.

As to unlawfulness of "gift enterprises," see *Wooden v. Shotwell*, 4 *Zabr.*, 789; *Bell v. State*, 5 *Sneed*, 507.

**Lottery de-  
clared a  
public nui-  
sance.**

**§ 371. Every lottery is unlawful and a common and public nuisance.**

See 1 *Rev. Stat.*, 665, § 26; *Const. of 1846*, art. I, § 10. This provision of the Constitution, viz.: "Nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state;" has rendered obsolete many of the distinctions of our former laws relative to lotteries, and has enabled the Commissioners to present provisions much more brief and simple than those of the Revised Statutes and subsequent enactments, while they are also in reality more stringent.

It may here be remarked that, in view of the modification of the law, since the enactment of the Revised Statutes, by which all lotteries are made unlawful, the Commissioners have regarded lottery tickets as no longer the subject of property which the law will be sedulous to protect; and they have omitted those provisions of the Revised Statutes which made forgery and larceny of such tickets punishable. The reasons upon which the forgery of foreign bank notes of a particular denomination has been held criminal notwithstanding the circulation of bills of such denomination has been made unlawful, are not considered fully applicable to the case of lottery tickets.

**Setting up  
lotteries.**

**§ 372. Every person who contrives, prepares, sets up, proposes or draws any lottery, is punishable by a fine equal to double the amount of the whole sum or value for which such lottery was made; and if such amount cannot be ascertained, then by imprisonment in a state prison not exceeding two years, or by imprisonment in a county jail not exceeding one year, or by a fine of two thousand five hundred dollars, or by both such fine and imprisonment.**

See 1 *Rev. Stat.*, 665, § 27.

**§ 373.** Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest, or any paper, certificate or instrument, purporting or represented or understood to be, or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor.

*1 Rev. Stat., 666, § 29.*

Selling  
lottery  
tickets.

**§ 374.** Every person who buys, or in any manner whatever accepts or receives for himself or another, any ticket, chance, share or interest, or any paper, certificate, or instrument, purporting or represented or understood to be, or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, forfeits ten dollars, to be recovered by the persons charged with the support of the poor in the locality where the offense was committed.

Buying  
lottery  
tickets.

**§ 375.** Every person who, by writing or printing, by circulars or letters, or in any other way, advertises or publishes any account of any lottery, stating when or where the same is to be or has been drawn, or what are the prizes or any of them therein, or the price of a ticket or of any share or interest, or where it may be obtained, or in any way aiding or assisting the same, or adapted to induce persons to adventure therein, is guilty of a misdemeanor.

Advertising  
lotteries.

Founded upon 1 *Rev. Stat.*, 665, § 28; the punishment being modified to correspond with other provisions of the Code.

**§ 376.** Every person who offers for sale, distribution or disposition in any way, any real or personal property, or things in action, or any interest therein, to be determined by lot or chance that shall be dependent upon the drawing of any lottery, within or out of this state; and every person who sells, furnishes or procures, or causes to be sold, furnished or procured in any manner whatsoever, any chance or share, or any interest whatever, in any property

Offering  
property  
for disposal  
dependent  
upon the  
drawing of  
any lottery.

offered for sale, distribution or disposition in violation of this section, or any ticket or other evidence of any chance, share or interest in such property, is guilty of a misdemeanor.

See 1 *Rev. Stat.*, 666, § 30.

*Lottery offices.*

§ 377. Every person who opens, sets up or keeps, by himself, or by any other person or persons, any office or other place for registering the numbers of any ticket in any lottery, or for making, receiving or registering any bets or wagers upon the drawing, determination or result of any lottery, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars.

1 *Rev. Stat.*, 667, §§ 34, 37.

*Advertising lottery offices.*

§ 378. Every person who by writing or printing, by circulars or letters, or in any other way, advertises or publishes any account of the opening, setting up or keeping of any office or other place for either of the purposes prohibited by the last section, is guilty of a misdemeanor.

See 1 *Rev. Stat.*, 667, § 37; *Id.*, 665, § 28.

*Insuring lottery tickets, &c.*

§ 379. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket, share or interest in any lottery, or for or against the drawing of any number, or ticket, or number of any ticket in any lottery ; and every person who receives any valuable consideration upon any agreement to pay any sum, or to deliver any property or thing in action in the event that any ticket, share or interest in any lottery, or any number, or ticket, or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn on any particular day, or in any particular order ; and every person who promises, agrees or offers to pay any sum of money or to deliver any property or thing in action, or to do, or forbear to do anything for the benefit of any other person, with or

without consideration, upon any event whatever connected with any lottery, is guilty of a misdemeanor.

See 1 *Rev. Stat.*, 667, §§ 36, 37.

**§ 380.** Every person who by writing or printing, by circulars or letters, or in any other way, advertises or publishes any offer, notice, or proposal for any violation of the last section, is guilty of a misdemeanor.

Advertising offers to insure lottery tickets.

**§ 381.** All property offered for sale, distribution or disposition, in violation of the provisions of this chapter, is forfeited to the people of this state, as well before as after the determination of the chance on which the same was dependent. And it is the duty of the respective district attorneys, to demand, sue for and recover, in behalf of this state, all property so forfeited, and to cause the same to be sold when recovered, and to pay the proceeds of the sale of such property, and any moneys that may be collected in any such suit, into the county treasury, for the benefit of the poor.

Property offered for disposal in lotteries forfeited.

See 1 *Rev. Stat.*, 666, § 31.

**§ 382.** Every person who lets, or permits to be used any building or portion of any building, knowing that it is intended to be used for any of the purposes declared punishable by this chapter, is guilty of a misdemeanor.

Letting building for lottery purposes.

**§ 383.** The provisions of this chapter apply in respect to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

Lotteries out of this state.

**§ 384.** The provisions of sections 375 and 378 are applicable wherever the advertisement was published, or the letter or circular sent or delivered through or in this state, notwithstanding the person causing or procuring the same to be published, sent or delivered, was out of this state at the time of so doing.

Advertisements by persons out of this state.

## CHAPTER IX.

## GAMING.

- SECTION 385. Keeping gambling apparatus in certain places.  
 386. Punishment.  
 387. Gambling apparatus declared a nuisance.  
 388. Winning at play by fraudulent means.  
 389. Exacting payment of money won at play.  
 390. Winning or losing upwards of twenty-five dollars.  
 391. Witness' privilege.  
 392. Keeping gambling establishments or letting places for gambling purposes.  
 393. Keeping gambling tables, promoting prohibited games, &c., prohibited.  
 394. Seizure of gambling implements authorized.  
 395. Such implements to be destroyed or delivered to district attorney.  
 396. Such implements to be destroyed upon conviction.  
 397. Persuading another person to visit gambling places.  
 398. Certain officers directed to prosecute offenses under this chapter.  
 399. Duty of masters to suppress gambling on board their vessels.  
 400. Racing of animals for a stake.  
 401. Racing near a court.

*Keeping  
gambling  
apparatus  
in certain  
places.*

§ 385. It is unlawful to maintain or keep any table, cards, dice or any other article or apparatus whatever, useful or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at either of the following places :

1. Within any building, or the appurtenances or grounds connected with any building in which any court of justice usually holds its sessions; or any building, any part of which is usually occupied by any religious corporation, or any incorporated benevolent, charitable, scientific or missionary society, or any incorporated academy, high school, college or other institution of learning, or any library company, or building and mutual loan company;
2. Within any building or the appurtenances or grounds connected with any building, while votes are being received or canvassed therein at any election

for any officer of this state, or of the United States; or while any public meeting is being held therein;

3. Within the distance of one mile from any grounds upon which any training, review, drill or exercise of any military organization created or permitted by the laws of this state, is proceeding, or upon which any public fair, exhibition, exercise or meeting is being held or conducted, in the open air;

4. Within any vessel lying in, or navigating any of the waters of this state; or owned, or navigated by, or for account of any corporation created by the laws of this state.

**§ 386.** Every person who knowingly violates the last section is guilty of a misdemeanor. Punish  
ment.

**§ 387.** Every article or apparatus maintained or kept in violation of section 385, is a common and public nuisance. Gambling  
apparatus  
declared a  
nuisance.

**§ 388.** Every person who, by any fraud, cheat, or false pretense whatsoever, while playing at any game, or while bearing a share in any wagers played for, or while betting on the sides or hands of such as play, wins or acquires to himself, or to any other, any sum of money or other valuable thing, is guilty of a misdemeanor. Winning at  
play by  
fraudulent  
means.

See 1 Rev. Stat., 662, § 11. The words, "and on conviction shall be deemed infamous," at the close of this section, in the Revised Statutes, are omitted.

**§ 389.** Every person who exacts or receives from another, directly or indirectly, any valuable consideration, by reason of the same having been won by playing at cards, faro, or any other game of chance, or any bet or wager whatever upon the hands or sides of players, forfeits five times the value of the consideration so exacted or received, to be recovered in a civil action, by the persons charged with the support of the poor in the locality. Exactin<sup>r</sup>  
payment of  
money won  
at play.

in which the offense was committed, for the benefit of the poor.

See 1 *Rev. Stat.*, 662, § 12.

Recommended as a substitute for 1 *Rev. Stat.*, 662, § 12, which is as follows:

"Every person who shall, at any one time or sitting, win, by playing at any game, of any one or more persons, any sum or value, shall forfeit five times the value of the money or other things so won, to be recovered by and in the name of the overseers of the poor of the town for the use of the poor."

The offense consists, when carefully considered, not so much in winning the money as in exacting or receiving payment of the money when won.

Winning or  
losing up-  
wards of  
\$25.

§ 390. Every person who wins or loses at play or by betting, at any time, the sum or value of twenty-five dollars or upwards, within the space of twenty-four hours, is punishable by a fine not less than five times the value or sum so lost or won, to be recovered in a civil action, by the persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.

1 *Rev. Stat.*, 662, § 13.

Witness'  
privilege.

§ 391. No person shall be excused from giving any testimony or evidence upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony or evidence shall not be received against him upon any criminal investigation or proceeding.

*Omitted provisions.* The following provision of the Revised Statutes is omitted for the reason that it pertains to evidence in civil causes, and if retained at all should be transferred to the Code of Civil Procedure:

"No person, other than the parties in the cause, shall be incapacitated or excused from testifying, touching any offense committed against any of the foregoing provisions relating to gaming, by reason of his having played, betted or staked, at any game, as herein prohibited; but the testimony of any such person shall not be used against him in any suit or prosecution hereby authorized."

1 *Rev. Stat.*, 663, § 18.

The following provision of the Revised Statutes is

omitted because it is anomalous, and amounts to conferring a pardoning power upon the court:

"Any person offending against any of the provisions contained in this article, who shall be admitted and examined as a witness in any court of record, to sustain any suit or prosecution herein authorized, may, by rule of the court, be discharged from all penalties by reason of such offense, if such person hath not been before convicted thereof, or of a similar offense, and if it appear to the court satisfactorily that such person was duped or enticed into the commission of the offense by those against whom he shall testify." 1 *Rev. Stat.*, 664, § 21.

As to witness' privilege, see note to section 200.

**§ 392.** Every person who keeps any building or part of any building, or any vessel or float to be used or occupied for gambling, and every owner, agent or superintendent of any such place who knowingly lets the same or allows it to be used or occupied for gambling, is guilty of a misdemeanor.

Keeping  
gambling  
establish-  
ment or let-  
ting places  
for gam-  
bling pur-  
poses.

See *Laws of 1851*, ch. 504, § 1.

**§ 393.** Every person who, for gambling purposes, keeps or exhibits any gambling table, establishment, device or apparatus, or is guilty of dealing "faro" or banking for others to deal "faro," or acting as "look-out" or game-keeper for the game of "faro," or any other banking game where money or property is dependent upon the result, or who sells or vends what are commonly called lottery policies, or any writing, card, paper or document in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery, or indorses a book or any other document for the purpose of enabling others to sell or vend lottery policies, is deemed a common gambler, and is punishable as for a misdemeanor.

Keeping  
gambling  
tables,  
pro-  
moting pro-  
hibited  
games, &c.,  
prohibited.

*Laws of 1851*, ch. 504, § 2, as amended *Laws of 1855*, ch. 214, the punishment being modified. By the existing laws the punishment prescribed is that the accused shall be sentenced "to not less than ten days' hard labor in the penitentiary, or not more than two years' hard labor in the state prison, and be fined in any sum not more than one thousand dollars, to be paid into the

county treasury where such conviction shall take place, for the use of the common schools therein, to be divided among the school districts in that county, in the same manner as the school money of the state is divided among said districts, and in default thereof shall remain imprisoned until such fine be remitted or paid." This punishment is anomalous, and the offense has, therefore, been declared a misdemeanor, in order to harmonize the penalties throughout the Code.

**Seizure of  
gambling  
implements  
authorized.**

§ 394. Every person who is authorized or enjoined to arrest any person for a violation of the provisions of this chapter, is equally authorized and enjoined to seize any table, cards, dice or other article or apparatus, suitable to be used for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

Provisions regulating the issuing and execution of search warrants, applicable to cases, among others, where it is desired to discover property which is in possession of any person with intent to use it as the means of committing a public offense, are reported, *Code Cr. Pro.*, §§ 861-883.

**Such imple-  
ments to be  
destroyed  
or delivered  
to district  
attorney.**

§ 395. The magistrate to whom any thing suitable to be used for gambling purposes is delivered pursuant to the foregoing section, shall, upon the examination of the accused, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the accused in violation of the provisions of this chapter; and if he finds that it is of a character suitable to be used for gambling purposes, and that it has been used by the accused in violation of this chapter, he shall cause it to be destroyed or to be delivered to the district attorney of the county in which the accused is liable to indictment or trial, as the interests of justice, in his judgment, require.

**Such imple-  
ment to be  
destroyed**

§ 396. Upon the conviction of the accused such district attorney shall cause any such thing suitable

to be used for gambling purposes, in respect whereof the accused stands convicted, and which remains in the possession or under the control of such district attorney, to be destroyed.

upon conviction

**§ 397.** Every person who persuades another to visit any building or part of a building, or any vessel or float used or occupied for the purpose of gambling, in consequence whereof such other person gambles therein, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, is liable to such other person in an amount equal to any money or property lost by him at play at such place, to be recovered in a civil action.

Persuading another person to visit gambling places.

Founded on *Laws of 1851*, ch. 504, § 2.

**§ 398.** It is the duty of all sheriffs, police officers, constables, and prosecuting or district attorneys to inform against and prosecute all persons whom they have credible reason to believe are offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding five hundred dollars.

Certain officers directed to prosecute offenses under this chapter.

See *Laws of 1851*, ch. 504, § 6.

**§ 399.** If any commander, owner or lessee of any vessel or float, knowingly permits any gambling for money or property on board such vessel or float, and does not, upon his knowledge of the fact, immediately prevent the same, he is punishable by a fine not exceeding five hundred dollars; and in addition thereto is liable to any party losing any money or property by means of any gambling permitted in violation of this section, in a sum equal to the money or property, to be recovered in a civil action.

Duty of masters to suppress gambling on board their vessels.

See *Laws of 1851*, ch. 504, § 7.

**§ 400.** All racing or trial of speed between horses or other animals for any bet, stake or reward, except such as is allowed by special laws, is a common nuisance; and every person acting or aiding therein, or making or being interested in any such bet, stake or

Racing of animals for a stake.

reward is guilty of a misdemeanor; and in addition to the penalty prescribed therefor he forfeits all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof.

*See Rep. Pol. Code, §§ 775, 777, 778.*

## CHAPTER X.

### PAWNBROKERS.

#### SECTION 401. Pawnbroking without a license.

402. Refusing to exhibit stolen goods to owner.

403. Selling before time to redeem has expired and refusing to disclose particulars of sale.

Pawnbrok-  
ing without  
a license.

§ 401. Every person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at any rate of interest above that allowed by law, except by authority of a license from a municipal corporation empowered to grant licenses to pawnbrokers, is guilty of a misdemeanor.

*See 1 Rev. Stat., 711, § 9.*

Refusal to  
exhibit  
stolen  
goods to  
owner.

§ 402. Every pawnbroker or person carrying on the business of a pawnbroker, and every junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, is guilty of a misdemeanor.

Selling be-  
fore time  
to redeem  
has expired  
and refu-  
sing to dis-  
close par-  
ticulars of  
sale.

§ 403. Every pawnbroker who sells any article received by him in pledge, before the time to redeem the same has expired, and every pawnbroker who willfully refuses to disclose the name of the purchaser and the price received by him for any article received by him in pledge, and subsequently sold, is guilty of a misdemeanor.

## TITLE XI.

## OF OTHER INJURIES TO PERSONS.

- SECTION 404.** Acts of intoxicated physicians.
- 405. Willfully poisoning food, &c.
  - 406. Overloading passenger vessel.
  - 407. Mismanagement of steamboats.
  - 408. Mismanagement of steam boilers.
  - 409. Fictitious copartnership names.
  - 410. Counterfeiting trade marks.
  - 411. Keeping dies, &c., with intent to counterfeit trade marks.
  - 412. Selling goods which bear counterfeit trade marks.
  - 413. Colorable imitations of trade marks.
  - 414. "Trade mark" defined.
  - 415. "Goods" defined.
  - 416. "Affixing" defined.
  - 417. Refilling or selling stamped mineral water bottles, &c.
  - 418. Keeping such bottles with intent to refill or sell them.
  - 419. Search for bottles kept in violation of law, authorized.
  - 420. Defacing marks upon wrecked property.
  - 421. Defacing marks upon logs or lumber.
  - 422. Officer unlawfully detaining wrecked property.
  - 423. Fraud in affairs of limited partnership.
  - 424. Solemnizing unlawful marriages.
  - 425. Unlawful confinement of idiots, insane persons, &c.
  - 426. Taking usury.
  - 427. Reconfining persons discharged upon writ of deliverance.
  - 428. Concealing persons entitled to writ of deliverance.
  - 429. Assisting to secrete such persons.

**§ 404.** Every physician, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act as such physician, to another person, by which the life of such other is endangered, is guilty of misdemeanor.

See 2 Rev. Stat., 694, § 22; and *supra*, § 257.

**§ 405.** Every person who willfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being to his injury, and every person who willfully poisons any spring, well or reservoir of water, is punishable by imprisonment in a state prison not exceeding ten years, or in a county jail not exceeding one year, or

Acts of  
intoxicated  
physicians.

willfully  
poisoning  
food, &c.

by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

*2 Rev. Stat., 666, § 33.*

Overload-  
ing passen-  
ger vessel.

§ 406. Every person navigating any vessel for gain, who willfully or negligently receives so many passengers or such a quantity of other lading on board such vessel, that by means thereof such vessel sinks or is overset or injured, and thereby the life of any human being is endangered, is guilty of a misdemeanor.

See *2 Rev Stat., 694, § 24.*

Misman-  
agement of  
steamboats

§ 407. Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates or allows to be created such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking human life is endangered, is guilty of a misdemeanor.

Embodyes the provision of *2 Rev. Stat., 694, § 25;* modified in expression to correspond with the analogous provision of § 255 of this Code.

Misman-  
agement of  
steam boil-  
ers.

§ 408. Every engineer or other person having charge of any steam boiler, steam engine, or other apparatus for generating or employing steam, employed in any manufactory, railway or other mechanical works, who, willfully or from ignorance or gross neglect, creates or allows to be created such an undue quantity of steam as to burst or break the boiler or engine or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

Compare section 256 of this Code.

Fictitious  
copartner-  
ship names.

§ 409. Every person transacting any business in the name of a person as a partner who is not interested in his firm, or transacting business under a firm name in

which the designation "and company" or "& Co." is used without representing an actual partner, except in the cases in which the continued use of a copartnership name is authorized by law, is guilty of a misdemeanor.

*Laws of 1833*, ch. 281. Compare, also, *Laws of 1849*, ch. 347; *Laws of 1854*, ch. 400; *Laws of 1863*, ch. 144; which regulate the continued use of copartnership names.

**§ 410. Every person who willfully forges, counterfeits or procures to be forged or counterfeited any trade mark usually affixed by any person to any goods of such person, with intent to pass off any goods to which such forged or counterfeit trade mark is affixed or intended to be affixed, as the goods of such person, is guilty of a misdemeanor.**

Counterfeiting  
trademarks

Founded upon *Laws of 1862*, ch. 306, § 1, the phraseology being rendered more concise, and the punishment being reduced from an imprisonment not less than six months and not more than twelve or a fine not exceeding five thousand dollars to that of a misdemeanor.

The subject of counterfeiting trade marks, including the kindred topic of refilling and selling stamped mineral water bottles, has very recently received the careful attention of the Legislature. In 1845 an act was passed (*Laws of 1845*, ch. 279,) punishing the forgery of stamps or labels. In 1850, the provisions of this act were somewhat enlarged. In 1862, both these acts were repealed; and a more comprehensive and stringent statute was passed (*Laws of 1862*, ch. 306), which, with an amendment enacted in 1863 (*Laws of 1863*, ch. 209), giving the party aggrieved a civil remedy, in addition to the fine and imprisonment prescribed by the act of 1862, embodies the law existing at the present time, upon the general subject of counterfeiting trade marks. The kindred offense of selling mineral waters, water-bottles, and others bearing the stamp of a particular manufacturer was made punishable by *Laws of 1847*, ch. 207; which was amended by *Laws of 1860*, ch. 117.

In the sections in the text upon these subjects the Commissioners have embodied the provisions of these statutes, omitting some provisions not within the scope of the Penal Code, and retrenching the phraseology and modifying the measure of punishment to correspond with the forms of expression used and penalties prescribed throughout the Code. They have also adopted some of the provisions of a very stringent English statute on this subject, passed in 1862; the 25th & 26th Vict., ch. 88.

**Keeping  
dice, &c.,  
with intent  
to counter-  
feite trade  
marks.**

§ 411. Every person who, with intent to defraud, has in his possession any die, plate or brand, or any imitation of the trade mark of any person, for the purpose of making any counterfeit or imitation of any description whatever of such trade mark, or of selling the same when made, or of affixing the same to any goods, and selling or offering the same for sale or disposal as the original goods of any other person; and every person who so uses or sells the same, or who fraudulently uses the genuine trade mark of another with intent to sell or offer for sale or disposal any goods not the goods of the person to whom such trade mark properly belongs, as genuine and original, is guilty of a misdemeanor.

Founded on *Laws of 1862*, ch. 306, § 2.

**Selling  
goods  
which bear  
counterfeit  
trade marks**

§ 412. Every person who sells or keeps for sale any goods upon which any counterfeited trade mark has been affixed, intended to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

Founded upon *Laws of 1862*, ch. 306, § 3; as amended *Laws of 1863*, ch. 209, § 1.

**Colorable  
imitations  
of trade  
marks.**

§ 413. Every person who, with intent to defraud, affixes or causes to be affixed to any goods or to any bottle, case, box or other package containing any goods, any description of label, stamp, brand, imprint, printed wrapper, label or mark, which designates such goods by any word or token which is wholly or in part the same to the eye, or to the ear, as the word or any of the words or tokens used by any other person as his trade mark, and every person who knowingly sells, or keeps or offers for sale, any such bottle, case, box, or other package, with any such label, stamp, brand, imprint, printed wrapper, ticket or mark affixed to or upon it, in case the person affixing or causing to be affixed such mark, or so selling, or exposing or offering for sale such bottle, case, box, or other package, was not the first to employ or use such words as his trade mark, is guilty

of a misdemeanor; and in addition to the punishment prescribed therefor is also liable to the party aggrieved in the penal sum of one hundred dollars for each and every offense, to be recovered by him in a civil action.

*Laws of 1862, ch. 306, § 4; as amended Laws of 1863, ch. 209, § 2.*

§ 414. The word "trade mark," as used in the sections preceding, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded or sold by him; other than any name, word or expression generally denoting any goods to be of some particular class or description.

See *Stat., 25 and 26 Vict., ch. 88, § 1.*

§ 415. The word "goods," as used in the sections preceding, includes every kind of goods, wares, merchandise, compound or preparation, which may be lawfully kept or offered for sale.

§ 416. The offense of affixing a false trade mark to goods is equally complete within the meaning of sections 410, 412, and 413, whether such mark is affixed to the goods themselves, or to any box, bale, barrel, bottle, case, cask, wrapper, or other package or vessel, or any cover or stopper thereof, in which such goods are put up.

See *Stat., 25 and 26 Vict., ch. 88.*

§ 417. Whenever any person engaged in manufacturing, bottling, or selling in bottles, soda, mineral waters, porter, ale, cider or small beer, has filed and published, in the manner authorized by law, a description of a name, mark, or label, usually stamped by him in the bottles containing such beverage, every other person who, without the written consent of such manufacturer or dealer, refills with any

Refilling  
or selling  
stamped  
mineral  
water bot-  
tles, &c.

beverage, whether genuine or otherwise, with intent to sell the same, any bottles stamped with such name, mark, or label; and every person who sells, disposes of, purchases or traffics in such bottles, is liable to a penalty of fifty cents for each and every bottle so filled, sold, bought, disposed of, or trafficked in, for the first offense, and five dollars for each and every bottle so filled, sold, bought, disposed of, or trafficked in, for every subsequent offense.

*Laws of 1860, ch. 117, § 1; modified to correct the defect pointed out in Mullins v. People (24 N. Y., 398; S. C., 23 How. Pr., 289); that the keeping of bottles secreted upon the premises of the defendant subjects him, under the language of the act of 1860, to a search warrant to discover them, but not to any criminal penalty.*

Keeping  
such bottles  
with intent  
to refill or  
sell them.

§ 418. Every person who keeps any bottles such as are designated in the last section, without the written consent of the manufacturer so to do, unless it appears that they were not kept with intent to refill or use or sell them in violation of the last section, is liable to the penalty therein prescribed.

Search for  
bottles kept  
in violation  
of law, au-  
thorized.

§ 419. Whenever any manufacturer or dealer designated by section 417, or his agent, shall make oath or affirmation before any magistrate that he has reason to believe, and does believe, that any of his bottles stamped and registered as mentioned in said section are being unlawfully used by any person or persons selling or manufacturing mineral water or other beverages, or that any junk dealer, or vender of bottles, has any of such bottles secreted in any place, such magistrate shall thereupon issue a search warrant to discover and obtain the same under the provisions of the Code of Criminal Procedure, which are hereby declared to fully relate to the purposes of this chapter; and the magistrate may summarily bring or cause to be brought before him the person in whose possession the bottles are found, to examine into the circumstances of his possession, and if such magistrate, on summary examination, finds that such person

has been guilty of a violation of section 417, such magistrate shall proceed to impose the fine therein prescribed, and, if the same be not paid, to commit such person to prison for a term not exceeding fifteen days.

*See Laws of 1860, ch. 117, § 2.*

**§ 420.** Every person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading or other document tending to show the ownership, is guilty of a misdemeanor.

Defacing  
marks upon  
wrecked  
property.

*Rep. Pol. Code, § 305.*

**§ 421.** Every person who cuts out, alters or defaces any mark made upon any log or lumber, whether such mark be recorded or not, or puts a false mark upon any log or lumber floating in any of the waters of this state or lying upon land, is guilty of a misdemeanor.

Defacing  
marks upon  
logs or lum-  
ber.

*Rep. Pol. Code, § 295.*

**§ 422.** Every officer who, without authority of law detains any wrecked property or the proceeds thereof, after the salvage and expenses chargeable thereon have been paid or offered to him, or who is guilty of any fraud, embezzlement or extortion in the discharge of his duties, or who violates any provision of Article IV of Chapter I of Title III of the Political Code, is guilty of a misdemeanor.

Officer un-  
lawfully  
detaining  
wrecked  
property

*Rep. Pol. Code, § 303.*

**§ 423.** Every member of a limited partnership who is guilty of any fraud in the affairs of the partnership, is guilty of a misdemeanor.

Fraud in  
affairs of  
limited  
partnership

*See 1 Rev. Stat., 766, § 19.*

**§ 424.** Every minister, or magistrate who solemnizes any marriage where either of the parties is

Solemniz-  
ing unlaw-  
ful mar-  
riages.

## THE PENAL CODE

known to him to be within the age of legal consent, or to be an idiot or an insane person, or any marriage to which within his knowledge any legal impediment exists, is guilty of a misdemeanor.

Corresponds with 2 *Rev. Stat.*, 140 [§ 12]. The words "an insane person" are substituted for the word "lunatic" as there may be forms of insanity which incapacitate from marriage, which are not embraced in the term "lunatic" as now usually employed.

Unlawful confinement of idiots, insane persons, &c.

**§ 425.** Every overseer of the poor, constable, keeper of a jail or other person who confines any idiot, lunatic or insane person in any other manner or in any other place than is authorized by law, is guilty of a misdemeanor.

See 1 *Rev. Stat.*, 625, § 11.

Taking usury.

**§ 426.** Every person who directly or indirectly receives any interest, discount, or consideration upon the loan or forbearance of any money, goods or things in action greater than is allowed by law, is guilty of a misdemeanor.

See 1 *Rev. Stat.*, 773, § 15.

Reconfining persons discharged upon writ of deliverance.

**§ 427.** Every person who either solely or as a member of a court, in the execution of a judgment, order or process, knowingly recommits, imprisons or restrains of his liberty, for the same cause, any person who has been discharged from imprisonment upon a writ of deliverance, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits to the party aggrieved, one thousand dollars to be recovered in a civil action.

Corresponds with *Rep. Code Civ. Pro.*, § 1339.

Concealing persons entitled to writ of deliverance.

**§ 428.** Every person having in his custody or power or under his restraint a party who, by the provisions of Chapter V of Title II of Part III of the Code of Civil Procedure, would be entitled to a writ of deliverance, or for whose relief a suit of deliverance has been issued, who, with intent to elude the service of such or suit, to avoid the effect thereof, transfers the party

to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who without lawful excuse refuses to produce him is guilty of a misdemeanor.

*Rep. Code Civ. Pro., § 1340.*

§ 429. Every person who knowingly assists in the violation of the last section is guilty of a misdemeanor.

Assisting  
to secrete  
such per-  
sons.

*Rep. Code Civ. Pro., § 1341.*

The provision of 2 *Rev. Stat.*, 149, § 7,—viz.: That “if any member of the society of Shakers, or any other person, shall send or carry, or cause to be sent or carried, any such child out of this state, or shall secrete such child or cause such child to be secreted within this state, so that such writ of habeas corpus cannot be executed, the person so offending shall be deemed guilty of a misdemeanor, and on conviction shall be fined not exceeding two hundred dollars, or be imprisoned not more than six months or both,—is omitted, as being merged in the preceding provisions.

## TITLE XII.

### OF CRIMES AGAINST THE PUBLIC HEALTH AND SAFETY.

#### SECTION 430. “Public nuisance” defined.

- 431. Unequal damage.
- 432. Maintaining a nuisance a misdemeanor.
- 433. Keeping gunpowder unlawfully.
- 434. Throwing gas tar into public waters.
- 435. Violations of quarantine laws, by master of vessel.
- 436. Giving false information relative to vessel, or permitting persons to land before visit of health officers.
- 437. Landing from vessel before visit of health officers.
- 438. Going on board vessel at quarantine grounds, or entering quarantine grounds without leave.
- 439. Violating quarantine regulations.
- 440. Obstructing health officer in performance of his duty.
- 441. Willful violation of health laws.
- 442. Unlicensed piloting.
- 443. Coasting steamers excepted.
- 444. Acting as portwarden without authority.
- 445. Apothecary omitting to label drugs, or labeling them wrongly.

- SECTION**
- 446. Apothecary selling poison without recording the sale.
  - 447. Refusing to exhibit record.
  - 448. Selling poison without label.
  - 449. Omitting to mark name upon package of hay.
  - 450. Putting extraneous substances in packages of goods usually sold by weight, with intent to increase weight.
  - 451. Adulterating food, drugs, liquors, &c.
  - 452. Disposing of tainted food.
  - 453. Making or keeping slung shot.
  - 454. Carrying upon the person, or using or attempting to use slung shot.
  - 455. Carrying concealed weapons.
  - 456. Negligence in respect to fires.
  - 457. Refusing to assist in extinguishing fire in the woods.
  - 458. Obstructing attempts to extinguish fires.
  - 459. Maintaining ferry without authority of law.
  - 460. Violating condition of recognizance to keep a ferry.
  - 461. Engineer omitting to ring bell or sound whistle when locomotive crosses highway.
  - 462. Intoxication of engineers, conductors and drivers upon railroads.
  - 463. Violations of duty by officers, agents or servants of railroad companies.
  - 464. Duty of guarding ice cuttings.
  - 465. How long such guards must be maintained.
  - 466. Violation of duty to maintain guards around ice cuttings a misdemeanor.
  - 467. Using net or weir unlawfully in Hudson river.
  - 468. Exposing person affected with a contagious disease, in a public place.
  - 469. Frauds practised to affect the market price.
  - 470. Publishing false statements in newspapers.
  - 471. Eavesdropping.
  - 472. Racing upon highways.

"Public  
nuisance"  
defined.

§ 430. A public nuisance is a crime against the order and economy of the state; and consists in unlawfully doing any act or omitting to perform any duty required by the public good, which act or omission either :

1. Annoys or injures the comfort, repose, health or safety of any considerable number of persons ; or,
2. Offends public decency ; or,
3. Unlawfully interferes with, obstructs, or tends to obstruct any lake, or any navigable river, bay, stream, canal or basin, or any public park, square, street or highway ; or,

**4. In any way renders life, or the use of property uncomfortable.**

Suggested as more appropriate for this Code than the definitions given in the Draft Civil Code, sections 1571, 1572, which are as follows:

“§ 1571. That is a nuisance which wrongfully causes loss, harm, annoyance, or great apprehension of danger, by:

1. Creating public alarm;
2. Disturbing public order;
3. Endangering the public health;
4. Offending public decency;
5. Obstructing a right of way;
6. Disgusting the senses; or,
7. In any way rendering life or the use of property uncomfortable.”

“§ 1572. A public nuisance is one which affects equally the rights of the whole community or neighborhood, although the extent of the damage may be unequal.”

The reasons for the change are chiefly: 1. That, while the definition in the Civil Code properly embraced both private and public nuisances, it is unnecessary for the purposes of the Penal Code to include private nuisances in the definition; and, 2. That the specific prohibition in other chapters of the Code, of some acts which have formerly been classed under the general term “public nuisance,” has rendered it practicable to restrict the definition of that term, in this Code, to some extent.

The following are the leading decisions which support the several clauses of the definition in the text.

*Subd. 1.* *Rex v. Wigg, Salk.*, 460; *2 Ld. Raym.*, 1163; *Rex v. Pierce, 2 Show.*, 327; *Rex v. Wharton, 12 Mod.*, 510; *Rex v. Smith, 1 Stra.*, 704; *Rex v. Moore, 3 Barn. & Ad.*, 184; *Rex v. White, 1 Burr.*, 333; *Rex v. Davey, 5 Esp.*, 217; *Rex v. Lloyd, 4 Id.*, 200; *Rex v. Neil, 2 Carr. & P.*, 485; *Putnam v. Payne, 13 Johns.*, 312; *Hinckley v. Emerson, 4 Cow.*, 351; *State v. Baldwin, 1 Dev. & B.*, 195; *Commonwealth v. Brown, 13 Metc.*, 365; *Reg. v. Lester, 3 Jur. (N. S.)*, 570; *Douglass v. State, 4 Wisc.*, 387.

*Subd. 2.* *State v. Bertheol, 6 Blackf.*, 474; *State v. Purse, 4 McCord*, 472; *Crane v. State, 3 Ind.*, 193.

*Subd. 3.* *Hall's case, Vent.*, 196; *1 Mod.*, 76; *2 Keb.*, 846; *Rex v. Leach, 6 Mod.*, 145; *Id.*, 155; *Rex v. Grosvenor, 2 Stark.*, 511; *Rex v. Hollis, Id.*, 536; *Rex v. Webb, 1 Ld. Raym.*, 737; *Rex v. Russell, 6 Barn. & C.*, 566; *Rex v. Trafford, 1 Barn. & Ad.*, 874; *Rex v. Watts, 2 Esp.*, 675; *Rex v. Tindall, 1 Nev. & P.*, 719; *6 Ad. & E.*, 143; *W. W. & D.*, 316; *Rex v. Ward, 4 Ad. & E.*, 384; *1 Har. & W.*, 703; *Rex v. Pease, 4 Barn. & Ad.*,

30; *Rex v. Morris*, 1 *Barn. & Ad.*, 441; *Reg. v. Botfield*, 1 *Carr. & M.*, 151; *Rex v. Smith*, 4 *Esp.*, 109; *Rex v. Canfield*, 6 *Esp.*, 136; *Rex v. Sarmon*, 1 *Burr.*, 516; *Rex v. Cross*, 3 *Camp.*, 224; *Rex v. Russel*, 6 *East.*, 427; 2 *Smith*, 424; *Rex v. Jones*, 3 *Camp.*, 230; *Rex v. Carlile*, 6 *Carr. & P.*, 637; *Rex v. Gregory*, 2 *Nev. & M.*, 478; 5 *Barn. & Ad.*, 555; *Reg. v. Scott*, 2 *Gale & D.*, 729; 3 *Ad. & E. (N. S.)*, 543; 3 *Railw. Cas.*, 187; *Reg. v. Betts*, 22 *Eng. L. & Eq.*, 240; *People v. Lawson*, 17 *Johns.*, 276; *People v. Cunningham*, 1 *Den.*, 524; *Renwick v. Morris*, 7 *Hill*, 575; *Harlon v. Humiston*, 6 *Cow.*, 189; *Lansing v. Smith*, 8 *Id.*, 146; *Dygert v. Schenck*, 23 *Wend.*, 446; *Drake v. Rogers*, 3 *Hill*, 604; *People v. Lambier*, 5 *Den.*, 9; *Moshier v. Utica & Schenectady R. R. Co.*, 8 *Barb.*, 427; *Hart v. Mayor, &c., of Albany*, 9 *Wend.*, 571; *Hecker v. N. Y. Balance Dry Dock Co.*, 13 *How. Pr.*, 549; and see *Same v. Same*, 24 *Barb.*, 215; *Peckham v. Henderson*, 27 *Barb.*, 207; *People v. Vanderbilt*, 24 *How. Pr.*, 301; *Wetmore v. Atlantic White Lead Co.*, 37 *Barb.*, 70; *Commonwealth v. Wright*, *Thach. Cr. Cas.*, 211; *Commonwealth v. Gowen*, 7 *Mass.*, 378; *State v. Spainhour*, 2 *Dev. & B.*, 547; *Commonwealth v. Tucker*, 2 *Pick.*, 44; *Commonwealth v. Webb*, 6 *Rand.*, 726; *State v. Godfrey*, 3 *Fairf.*, 361; *Commonwealth v. Ruggles*, 10 *Mass.*, 391; *State v. Mobley*, 1 *McMullan*, 44; *State v. Brown*, 16 *Conn.*, 54; *Elkins v. State*, 2 *Humph.*, 543; *Simpson v. State*, 10 *Yerg.*, 525; *State v. Miskimmons*, 2 *Carter*, 440; *Commonwealth v. Rush*, 14 *Penn. St.*, 186; *State v. Morris & Essex R. R. Co.*, 3 *Zabr.*, 360; *Commonwealth v. Bowman*, 3 *Barr.*, 202; *Commonwealth v. Milliman*, 13 *Serg. & R.*, 403; *Commonwealth v. Chapin*, 5 *Pick.*, 199; *State v. Hunter*, 5 *Ired.*, 369; *State v. Commissioners*, 3 *Hill (So. Car.)*, 149; *State v. Yarrell*, 12 *Ired.*, 130; *State v. Duncan*, 1 *McCord*, 404; *State v. Thompson*, 2 *Strobb.*, 12; *Commonwealth v. Elburger*, 1 *Whart.*, 469; *State v. Atkinson*, 24 *Vt.*, 448; *Newark Plankroad Co. v. Elmer*, 1 *Strocht.*, 754; *Attorney General v. Hudson River R. R. Co.*, *Id.*, 526; *Works v. Junction R. R. Co.*, 5 *McLean*, 425; *State v. Phipps*, 4 *Ind.*, 515; *State v. Freeport*, 43 *Me.*, 193.

*Subd. 4. Rex v. White*, *Burr.*, 333; *Rex v. Smith*, *Stra.*, 703; *White v. Cohen*, 19 *Eng. L. & Eq.*, 146; *Catlin v. Valentine*, 9 *Paige*, 575; *Brady v. Weeks*, 3 *Barb.*, 157; *Prescott's case*, 2 *City Hall Rec.*, 161; *Prout's case*, 4 *Id.*, 481; *Lynch's case*, 6 *Id.*, 61; *People v. Townsend*, 3 *Hill*, 479; *Hackney v. State*, 8 *Ind.*, 494; *State v. Wetherall*, 5 *Harring.*, 487; 3 *Blackst. Comm.*, 216; *Bell's Sc. Law Dict.*, tit. *Nuisance*.

The following are intended to be excluded from the definition, because they have been decided not to be

nuisances, upon grounds deemed to be sufficient by the Commissioners:

Exercising banking privileges without authority. Attorney General *v.* Bank of Niagara, *Hopk.*, 354.

An immigrant depot, if not kept in an improper manner. *Phoenix v. Commissioners of Emigration*, 1 *Abbott's Pr.*, 466.

A person sick of a contagious disease, if not needlessly exposed so as to endanger the public. *Boom v. City of Utica*, 2 *Barb.*, 104.

Several offenses which in this Code are made the subject of specific provisions have been held indictable under the common law definition of nuisance.

See as to throwing gas tar into public streams. *Rex v. Meadley*, 6 *Carr. & P.*, 292.

As to obstructing railways. *Reg. v. Holroyd*, 2 *M. & Rob.*, 339.

As to keeping gunpowder. *Rex v. Taylor*, 2 *Stra.*, 1167. *People v. Sands*, 1 *Johns.*, 78; *Myers v. Malcolm*, 6 *Hill* 292.

As to establishments for gaming and other useless sports. *Tanner v. Trustees of Albion*, 5 *Hill*, 121; *Updike v. Campbell*, 4 *E. D. Smith*, 570; *State v. Doon, R. M. Charl.*, 1; *State v. Haines*, 30 *Maine*, 65.

As to other disorderly houses. *Smith v. Commonwealth*, 6 *B. Monr.*, 21; *Bloomhuff v. State*, 8 *Blackf.*, 205; *State v. Bailey*, 1 *Fost.*, 343; *Rex v. Williams*, 1 *Salk.*, 384; *Hackney v. State*, 8 *Ind.*, 494.

As to dangerous driving through public streets. *U. S. v. Hart, Pet. C. C.*, 390.

As to exposure of the person. *Reg. v. Webb*, 1 *Den. C. C. R.*, 338; 13 *Jur.*, 42; 18 *Law J. (M. C.)*, 39.

As to digging up or injuring highways. *Reg. v. Sheffield Gas Consumers' Co.*, 22 *Eng. L. & Eq.*, 200; *State v. Peckhard*, 5 *Harring.*, 500.

As to neglect to keep ferry in repair. *State v. Willis, Bush*, 223.

As to profane swearing. *State v. Graham*, 3 *Sneed.*, 134.

Consult, also, upon other branches of the criminal law relative to what are nuisances, the following: *Rex v. Wigg*, 1 *Ld. Raym.*, 737; *Rex v. Village of Hornsey*, 1 *Ro.*, 406; *Anon.*, 12 *Mod.*, 342; *Rex v. Record*, 2 *Show.*, 216; *Rex v. Dunraven, W. W. & D.*, 577; *Rex v. Cross*, 2 *Carr. & P.*, 483; *Rex v. Neville, Peake*, 93; *Rex v. Watts, Mood. & M.*, 281; *Wetmore v. Tracy*, 14 *Wend.*, 250; *Harris v. Thompson*, 9 *Barb.*, 350; *Plant v. Long Island R. R. Co.*, 10 *Id.*, 26; *Leigh v. Westervelt*, 2 *Duer*, 618; *Williams v. N. Y. Central R. R. Co.*, 18 *Barb.*, 222; *Lynch's case*, 6 *City Hall Rec.*, 61; *Dygert v. Schenck*, 23 *Wend.*, 446; *People v. Cunningham*, 1 *Den.*, 424; *Renwick v. Morris*, 7 *Hill*, 575; *Peckham v. Henderson*,

*27 Barb.*, 207; *State v. Commissioners, Riley*, 146; *Ellis v. State*, 7 *Blackf.*, 534; *Works v. Junction Railroad*, 5 *McLean*, 425; *Douglass v. State*, 4 *Wis.*, 387; *Commonwealth v. Upton*, 6 *Gray*, 473.

Unequal  
damage.

**§ 431.** An act which affects a considerable number of persons, in either of the ways specified in the last section, is not less a nuisance because the extent of the damage is unequal.

Embodying a part of section 1572 of the Draft Civil Code; the words "a considerable number of persons" being substituted for "the whole community or neighborhood," to avoid uncertainty. It may be doubtful in some cases, whether the persons affected by an obstruction in a navigable stream, for instance, form what can be called a neighborhood.

Maintain-  
ing a nu-  
isance a mis-  
demeanor.

**§ 432.** Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Keeping  
gunpowder  
unlawfully.

**§ 433.** Every person who makes or keeps gunpowder or saltpeter within any city or village, and every person who carries gunpowder through the streets thereof, in any quantity or manner such as is prohibited by law, or by any ordinance of such city or village, is guilty of a misdemeanor.

See *Laws of 1846*, ch. 291, § 19. It is not intended to confine this provision to cases in which an explosion occurs. Keeping powder in violation of law, or of a local ordinance, should be punishable, irrespective of the question whether any mischief happens in the particular case.

Throwing  
gas tar into  
public  
waters.

**§ 434.** Every person who throws or deposits any gas tar, or refuse of any gas house or factory, into any public waters, river or stream, or into any sewer or stream running or emptying into any such public waters, river or stream, is guilty of a misdemeanor.

Founded upon *Laws of 1845*, ch. 201. That act applies only to the counties of New York, Kings and Queens.

In view of the extension of gas manufactories to almost all towns of considerable size throughout the state, the Commissioners think the provision should be made general.

**§ 435.** Every master of a vessel subject to quarantine or visitation by the health officer, arriving in the port of New York, who refuses or omits, either:

Violations  
of quaran-  
tine laws  
by master  
of vessel.

1. To proceed with and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo and passengers, to the examination of the health officer, and to furnish all necessary information to enable that officer to determine to what length of quarantine and other regulations they ought respectively to be subject; or,

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the directions and regulations prescribed by law, and with such as any of the officers of health, by virtue of the authority given to them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers or crew, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

*Laws of 1856, ch. 147, § 28.*

**§ 436.** Every master of a vessel hailed by a pilot who, either:

Giving  
false infor-  
mation re-  
lative to  
vessel, or  
permitting  
persons to  
land before  
visit of  
health offi-  
cers.

1. Gives false information to such pilot, relative to the condition of his vessel, crew or passengers, or the health of the place or places from whence he came, or refuses to give such information as shall be lawfully required; or,

2. Lands any person from his vessel, or permits any person, except a pilot, to come on board of his vessel, or unlades or transships any portion of his cargo before his vessel has been visited and examined by the health officers; or,

**3.** Approaches with his vessel nearer the city of New York than the place of quarantine to which he may be directed, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

*Laws of 1856, ch. 147, § 29.*

Landing  
from vessel  
before visit  
of health  
officers.

**§ 437.** Every person who, being on board any vessel at the time of her arrival at the port of New York, lands from such vessel, or unlades, or transhipps, or assists in unloading or transhipping any portion of her cargo, before such vessel has been visited and examined by the health officers, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

*See Laws of 1856, ch. 147, § 29.*

Going on  
board ves-  
sel at quar-  
antine  
grounds, or  
entering  
quarantine  
grounds  
without  
leave.

**§ 438.** Every person who goes on board of or has any communication, intercourse or dealing with any vessel at quarantine, or with any of the crew or passengers of such vessel, without the permission of the health officer, and every person who, without such authority enters the quarantine grounds or anchorage, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars, or both; and in addition thereto he may be detained at quarantine so long as the health officers shall direct, not exceeding twenty days. And in case such person shall be taken sick of any infectious, contagious or pestilential disease, during such twenty days, he may be detained for such further time at the marine hospital, as the health officer shall direct.

*Laws of 1856, ch. 147, § 32.*

Violating  
quarantine  
regulations

**§ 439.** Every person who, having been lawfully ordered by any health officer to be detained in quarantine, and not having been discharged, leaves the quarantine grounds or anchorage, or willfully violates any quarantine law or regulation, is guilty of a misdemeanor.

*See Laws of 1856, ch. 147, § 13.*

**§ 440.** Every person who willfully opposes or obstructs any health officer or physician charged with the enforcement of the health laws, in performing any legal duty, is guilty of misdemeanor.

Obstructing health officer in performance of his duty.

See *Laws of 1856*, eh. 147, § 31.

**§ 441.** Every person who willfully violates any provision of the health laws, the punishment for violating which is not otherwise prescribed by those laws, or by this Code; and every person who willfully violates or refuses or omits to comply with any lawful order, direction, prohibition or regulation prescribed by any board of health or health officer, or any regulation lawfully made or established by any public officer under authority of the health laws, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars, or both.

Willful violation of health laws.

See *Laws of 1856*, ch. 147, §§ 30, 31, 33; *Ibid.*, § 28, subd. 3.

**§ 442.** Every person not holding a license as pilot under Article V of Chap. I of Title III of the Political Code, or under the laws of the state of New Jersey, who pilots, or offers to pilot any vessel to or from the port of New York, by the way of Sandy Hook, except such as are exempt; and every person not being a Hellgate pilot, or one of the crew of the vessel who pilots or offers to pilot any vessel through Hellgate; and every master or person in command of any steam tug or tow boat who tows any vessel through Hellgate without having a licensed pilot on board, is guilty of misdemeanor.

Unlicensed piloting.

See *Rep. Pol. Code*, §§ 329, 345.

**§ 443.** The last section does not apply to vessels propelled wholly or in part by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

Coasting steamers excepted.

See *Rep. Pol. Code*, § 329.

**§ 444.** Every person who not being a port-warden, assumes or undertakes to act as such, or undertakes the

Acting as portwarden without authority.

performance of any of the duties prescribed in Article VII of Chap. I of Title III of the Political Code, as pertaining to the office of port-warden ; and every person who knowingly employs any other than the wardens for the performance of such duties ; and every person who issues any certificate of a survey on vessels, materials or goods damaged, with the intent to avoid the provisions of that article, is guilty of a misdemeanor.

*Rep. Pol. Code, § 355.*

Apothecary  
omitting to  
label drugs,  
or labeling  
them  
wrongly,  
&c.

§ 445. Every apothecary, or druggist, and every person employed as clerk or salesman by any apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently or ignorantly omits to label the same, or puts any untrue label, stamp or other designation of contents upon any box, bottle or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of misdemeanor.

The frequent occurrence of accidents, involving, often, even the loss of human life, through mistakes in the putting up of prescriptions, render necessary some legislation to enforce care and caution on the part of dealers in drugs. The recent case of *Thomas v. Winchester*, 2 *Seld.*, 397, illustrates the danger arising in a different class of cases, also embraced by the section in the text; viz.: cases in which a manufacturer or dealer in drugs sends them into the market under an untrue label; in consequence of which, retail dealers are innocently led to supply dangerous articles without intending it. In that case it appeared that defendants, who were manufacturing druggists, sold to a dealer a jar labeled, "extract of dandelion;" but which really contained extract of belladonna. The dealer, relying on the label, sold the jar to a retailer; and the latter, in turn, used a part of the contents of the

jar, supposing them to be extract of dandelion, in putting up a prescription in which that article was required. A dangerous illness was the result to the person taking the prescription. The court of appeals, in the case cited, held the manufacturers liable in damages to the injured person, notwithstanding the article had passed through intermediate sales, in reaching such person. This liability is founded upon the duty which the law imposes upon the dealer, to avoid acts dangerous to other persons; and not upon any contract, or privity between him and the consumer. Obvious considerations make it proper that this duty should be enforced by criminal penalty as by a remedy in damages.

**§ 446.** Every apothecary or druggist, and every person employed as clerk or salesman by any apothecary or druggist, or otherwise carrying on business as a dealer in drugs or medicines, who sells or gives any poison or poisonous substance, without first recording in a book to be kept for that purpose, the name and residence of the person receiving such poison, together with the kind and quantity of such poison received and the name and residence of some person known to such dealer, as a witness to the transaction, excepting upon the written order or prescription of some practising physician whose name is attached to such order, is guilty of a misdemeanor.

Apothecary  
selling poi-  
son without  
recording  
the sale.

Founded on *Laws of 1860*, ch. 442, § 1, as amended.  
*Laws of 1862*, ch. 273, § 1.

*Restriction to dealers.* The Commissioners have restricted the provision to sales or gifts made by persons dealing in drugs. The statute of 1860, is stringent enough to prohibit any individual from selling or giving an article of a poisonous character to another without opening a book and making a record of what is perhaps his only transaction of the kind for years. Such record cannot be expected to be kept, and serves no important purpose if kept, excepting when maintained in connection with an establishment of somewhat permanent and public character, carrying on a business of dealing in articles of the kind to be specified in the record.

*Contents of the record.* The act of 1860, as amended in 1862, requires the seller to record in a book "the name of the person receiving said poison, and his or her residence together with the name of some person as witness to such sale. The Commissioners have substituted for this language the words "the name and residence of the

person receiving such poison, together with *the kind and quantity of such poison received*, and the name and residence of some person *known to such dealer*, as a witness to the transaction." Unless the kind and quantity of the poison sold are inserted, the record is a mere list of persons who have bought poisons, and lacks the very element necessary to render it of service in any subsequent legal investigation. If the purchaser may bring his own witness with him, fictitious names and residences of witnesses will be imposed upon the dealer whenever the purchaser wishes to evade the law. And the word "transaction" is more appropriate than "sale" because by the antecedent provisions gifts are to be recorded equally with sales.

*The punishment.* For the sake of greater harmony in the system of penalties, this offense has been declared a misdemeanor, simply, instead of retaining the special penalty of fifty dollars affixed by the present statutes.

Refusing to exhibit record.

**§ 447.** Every person whose duty it is by the last section to keep any book for recording the sale or gift of poisons, and who willfully refuses to permit any person to inspect said book upon reasonable demand made during ordinary business hours, is punishable by a fine not exceeding fifty dollars.

See *Laws of 1860*, ch. 442, § 1, as amended by *Laws of 1862*, ch. 273, § 1.

Selling poison without label.

**§ 448.** Every person who sells, gives or disposes of any poison or poisonous substance, except upon the order or prescription of a regularly authorized practising physician, without attaching to the vial, box or parcel containing such poisonous substance, a label with the name and residence of such person, the word "poison" and the name of such poison all written or printed thereon in plain and legible characters, is guilty of a misdemeanor.

*Laws of 1860*, ch. 442, § 2. The reasons which influenced the commissioners to recommend that the provision requiring a record of transactions in poisons be restricted to the case of persons habitually dealing in kindred articles, (see note to section 446 *supra*) do not apply in all their force to the provision requiring the package to be labeled. But they do forbid preserving the exact provision of the present statute, which requires that the word "poison" be *printed in red ink*; while the particular name of the poison may be printed or written at the

dealer's option. Unless the furnishing of such articles as laudanum, corrosive sublimate, and the stronger acids by one neighbor to another, upon a casual necessity for their use is to be absolutely prevented, the requirement of a printed label will be inapplicable in a variety of cases arising under the statute. The Commissioners have thought it necessary, therefore, either to restrict this section as they have that relating to the record book to the case of dealers, or else to modify it by recognizing a label wholly in manuscript as a compliance with the law. This conforms to our former statute. *2 Rev. Stat.*, 694, § 23.

*What are poisons.* As the section enumerating the articles deemed poisonous, within the meaning of the act of 1860 (*Laws of 1860*, ch. 442, § 3), was deliberately repealed in 1862 (*Laws of 1862*, ch. 273, § 2), without any recognition of the propriety of a statutory enumeration, the Commissioners have not restored it.

*Restriction as to locality.* In view of the more guarded manner in which the provisions of sections 446 and 448 are expressed, they are deemed proper to be generally enforced throughout the state; therefore the provision of *Laws of 1860*, ch. 442, § 5, restricting the application of that act to incorporated cities and villages having a population of one thousand inhabitants and upwards, is omitted.

**§ 449.** Every person, who, in putting up or pressing any bundle or bale of hay for market, omits to mark or brand, in a legible manner, the initials of his name on some wood or metal securely attached to such bundle or bale of hay, is punishable by a fine of twenty-five dollars for each offense.

Omitting  
to mark  
name  
upon pack  
age of hay.

*Laws of 1860*, 155, §§ 1, 4.

**§ 450.** Every person, who, in putting up in any bag, bale, box, barrel or other package, any hops, cotton, hay or other goods usually sold in bags, bales, boxes, barrels or packages, by weight, puts in or conceals therein any thing whatever, for the purpose of increasing the weight of such bag, bale, box, barrel or package, is punishable by a fine of twenty-five dollars for each offense.

Putting ex-  
traneous  
substances  
in packages  
of goods  
usually sold  
by weight,  
with intent  
to increase  
weight.

See *Laws of 1860*, ch. 155, §§ 2, 4.

**§ 451.** Every person who adulterates or dilutes any article of food, drink, drug, medicine, strong, spiritu-

Adulterat-  
ing food,  
drugs, li-  
quors, &c.

ous or malt liquor, or wine, or any article useful in compounding either of them, whether one useful for mankind or for animals, with a fraudulent intent to offer the same, or cause or permit it to be offered for sale as unadulterated or undiluted; and every person who fraudulently sells, or keeps or offers for sale the same as unadulterated or undiluted, knowing it to have been adulterated or diluted, is guilty of a misdemeanor.

*Disposing  
of tainted  
food, &c.*

§ 452. Every person who knowingly sells, or keeps, or offers for sale or otherwise disposes of any article of food, drink, drug or medicine knowing that the same has become tainted, decayed, spoiled or otherwise unwholesome or unfit to be eaten or drank, with intent to permit the same to be eaten or drank by any person or animal, is guilty of a misdemeanor.

*Making or  
keeping  
slung shot.*

§ 453. Every person who manufactures or causes to be manufactured, or sells, or offers or keeps for sale, or gives or disposes of any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a misdemeanor.

See *Laws of 1849*, ch. 278, § 1.

*Carrying  
upon the  
person, or  
using or  
attempting  
to use slung  
shot.*

§ 454. Every person who carries upon his person, whether concealed or not, or uses or attempts to use against another, any instrument or weapon of the kind usually known as slung shot or of any similar kind, is guilty of felony.

See *Laws of 1849*, ch. 278, § 2. So much of this section as makes it felony to "be found in possession of" a slung shot is omitted because many cases of possession are covered by section 1 of that act; embodied in section 453, *supra*.

*Carrying  
concealed  
weapons.*

§ 455. Every person who carries concealed about his person any description of fire-arms, being loaded or partly loaded, or any sharp or dangerous weapon such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

Such a provision as the above does not infringe the provision of the United States constitution (Amendments

art. 2,) which declares that the right of the people to keep and bear arms, shall not be infringed; inasmuch as it is a measure of police, prohibiting only a *particular mode* of carrying arms, which is found dangerous to the peace of society. *State v. Zumel*, 13 *La. Ann.*, 399.

**§ 456.** Every person who negligently sets fire to his own woods, or negligently suffers any fire upon his own land to extend beyond the limits thereof, is guilty of a misdemeanor.

Negligence  
in respect  
to fires.

See *Rep. Pol. Code*, § 763.

**§ 457.** Every person who, having been lawfully ordered, as provided by section 764 of the Political Code, to repair to the place of a fire in the woods and assist in extinguishing it, omits without lawful excuse to comply with such order, is guilty of a misdemeanor.

Refusing to  
assist in  
extinguish-  
ing fire in  
the woods.

**§ 458.** Every person who, at any burning of a building is guilty of any disobedience to lawful orders of any public officer or fireman, or of any resistance to or interference with the lawful efforts of any fireman or company of firemen, to extinguish the same, or of any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

Obstructing  
attempts to  
extinguish  
fires.

**§ 459.** Every person who maintains any ferry for profit or hire upon any waters within this state, without authority of law, is punishable by a fine not exceeding twenty-five dollars for each time of crossing or running such ferry. Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either.

Maintain-  
ing ferry  
without  
authority  
of law.

Suggested as a substitute for *Rep. Pol. Code*, § 661.

**§ 460.** Every person who, having entered into a recognizance, as provided by section 659 of the Political Code, to keep and attend a ferry, violates the condition of such recognizance, is guilty of a misdemeanor.

Violating  
condition  
of recogni-  
zance to  
keep a ferry

See *Rep. Pol. Code*, § 660.

**Engineer omitting to ring bell or sound whistle when locomotive crosses highway.**

§ 461. Every person in charge, as engineer, of a locomotive engine, who omits to cause a bell to ring or a steam whistle to sound at the distance of at least eighty rods from the place where the track crosses, on the same level, any traveled public way, is punishable by a fine not exceeding fifty dollars, or by imprisonment in the county jail not exceeding sixty days.

See *Rep. Pol. Code*, § 557.

**Intoxication of engineers, conductors and drivers upon railroads.**

§ 462. Every person who, while in charge, as engineer, of a locomotive engine or while acting as conductor or driver upon any railroad train or car, whether propelled by steam or drawn by horses, is intoxicated, is guilty of a misdemeanor.

Substituted for *Rep. Pol. Code*, § 588.

**Violations of duty by officers, agents or servants of railroad companies.**

§ 463. Every engineer, conductor, brakeman, switch-tender or other officer, agent or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent or servant by which human life or safety is endangered, the punishment for which is not otherwise prescribed, is guilty of a misdemeanor.

**Duty of guarding ice cuttings**

§ 464. All persons and incorporated companies cutting ice in or upon any waters within the boundaries of this state, for the purpose of removing such ice for sale, shall surround the cuttings and openings made, with fences of bushes or other guards sufficient to warn all persons of such cuttings and openings.

See *Laws of 1860*, ch. 20, § 1.

**How long such guards must be maintained.**

§ 465. Such fences or guards must be erected at or before the time of commencing such cuttings or openings, and must be maintained until ice has again formed in such openings to the thickness of at least six inches.

*Ibid.*

**Violation of duty to maintain guards around ice cuttings a misdemeanor.**

§ 466. Every person who violates the provisions of the last two sections, is guilty of a misdemeanor.

*Ibid.*, § 2.

The act of 1860, ch. 20, § , on which the three sec-

tions in the text are founded, applies only to ice cuttings in the waters of the Hudson river and the tide waters of the Rondout and Catskill creeks; and it requires the fence to be at least four feet high. The Commissioners deem the principle upon which the act is founded, one which should be extended to other waters than those specified in the act. In many localities, however, a less expensive fencing than the act referred to requires, would give ample protection to the public. The Commissioners have, therefore, defined the duty in general terms, leaving the sufficiency of guards erected in any particular locality to be judged when occasion arises.

**§ 467.** Every person who uses any net or weir or sets any pole or other fixture in any part of the Hudson river, except as permitted by section 266 of the Political Code, is guilty of a misdemeanor.

Using net  
or weir un-  
lawfully  
in Hudson  
river.

*Rep. Pol. Code, § 266.*

**§ 468.** Every person who willfully exposes himself or another person, being affected with any contagious disease, in any public place or thoroughfare, except in his necessary removal in a manner not dangerous to the public health, is guilty of a misdemeanor.

Exposing  
person  
affected  
with a con-  
tagious dis-  
ease in a  
public  
place.

**§ 469.** Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

Franks  
practised to  
affect the  
market  
price.

**§ 470.** Every editor or proprietor of any newspaper who willfully publishes in such newspaper as true, any statement which he has not good reason to believe to be true, with intent to increase thereby the sales of copies of such paper, is guilty of a misdemeanor.

Publishing  
false  
statements  
in news-  
papers.

**§ 471.** Every person guilty of secretly loitering about any building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor.

Eavesdrop-  
ping.

The common law definition of this offense, which is known as "eavesdropping," seems to have confined it to

loitering about dwelling houses (2 *Bish. Cr. L.*, § 274; 1 *Russ. on Cr.*, 327; 4 *Blackst. Comm.*, 168). The reasons which render the act obnoxious to punishment when committed with reference to dwellings, apply, however, with nearly equal force, to buildings occupied for other purposes.

Racing  
upon high-  
ways.

§ 472. Every person driving any conveyance drawn by horses upon any public road or way, who causes or suffers his horses to run, with intent to pass another conveyance or to prevent such other from passing his own, is guilty of a misdemeanor.

Suggested as a substitute for *Rep. Pol. Code*, § 669.

## TITLE XIII.

### OF CRIMES AGAINST THE PUBLIC PEACE.

#### SECTION 473. Disturbing lawful meetings.

- 474. "Riot" defined.
- 475. Punishment of riot.
- 476. "Rout" defined.
- 477. Unlawful assembly.
- 478. Assembly of persons disguised.
- 479. Punishment of rout and unlawful assembly.
- 480. Allowing masquerades to be held in places of public resort.
- 481. Remaining present at place of riot, &c., after warning to disperse.
- 482. Remaining present at place of a meeting, originally lawful, after it has adopted an unlawful purpose.
- 483. Refusing to obey a lawful command to assist in arresting rioter.
- 484. Combinations to resist execution of process.
- 485. Prize fights.
- 486. Challenges to engage in prize fights.
- 487. What is a challenge.
- 488. Leaving the state to engage in prize fights.
- 489. Place of trial.
- 490. Special duty of peace officers with respect to prize fights.
- 491. Neglect of duty by peace officers, a misdemeanor.
- 492. Forceable entry and detainer.
- 493. Returning to take possession of lands after being removed by legal process.
- 494. Unlawful intrusions upon lands of another.
- 495. Discharging fire-arms in public places.
- 496. Witness' privilege.

**§ 473.** Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as are mentioned in sections 55, 79, and 359, of this Code, is guilty of a misdemeanor.

Disturbing  
lawful  
meetings.

The assemblies specified in the sections referred to are religious meetings, meetings of electors held for discussion of public questions, and funerals.

**§ 474.** Any use of force or violence, or any threat "Riot"  
to use force or violence if accompanied by immediate  
power of execution, by three or more persons  
acting together and without authority of law, is riot.

Consult State *v.* Conolly, 3 Rich., 337; State *v.* Snow, 6 Shep., 346; Dougherty *v.* People, 4 Scamm., 180; Rex *v.* Langford, 1 Car. & M., 604; State *v.* Cole, 2 McCord, 117; State *v.* Brooks, 1 Hill (So. Car.), 361; State *v.* Brazil, 1 Rice, 258; 4 Blackst. Comm., 146; 4 Burn's Just., tit. Riot; Bouv. Law Dict., Id.; 1 Hawk. P. C., ch. 65, § 1; Whart. Cr. L., 722; Chitty's Cr. L., 274; Reg. *v.* Sharpe, 3 Cox Cr. Cas., 288; 12 Law T., 537; Bankus *v.* State, 4 Ind., 114.

**§ 475.** Every person guilty of participating in any riot is punishable as follows:

Punish-  
ment of  
riot.

1. If any murder, maiming, robbery, rape or arson, was committed in the course of such riot, such person is punishable in the same manner as a principal in such crime.

2. If the purpose of the riotous assembly was to resist the execution of any statute of this state or of the United States, or to obstruct any public officer of this state or of the United States in the performance of any legal duty, or in serving or executing any legal process, such person is punishable by imprisonment in a state prison not exceeding ten years and not less than two.

3. If such person carried, at the time of such riot, any species of fire-arms, or other deadly or dangerous weapon, or was disguised, he is punishable by imprisonment in a state prison not exceeding ten years and not less than two.

4. If such person directed, advised, encouraged, or solicited other persons, who participated in the riot, to acts of force or violence, he is punishable by imprisonment in a state prison for not less than three years.

5. In all other cases such person is punishable as for a misdemeanor.

*Rout*  
defined.

§ 476. Whenever three or more persons, acting together, make any attempt or do any act towards the commission of an act which would be riot if actually committed, such assembly is a rout.

Unlawful  
assembly.

§ 477. Whenever three or more persons assemble with intent or with means and preparations to do an unlawful act which would be riot if actually committed, but do no act towards the commission thereof; or whenever such persons assemble without authority of law, and in such a manner as is adapted to disturb the public peace, or excite public alarm, such assembly is an unlawful assembly.

Consult upon the first branch of this section 4 *Blackst. Comm.*, 147; *Rex v. Birt*, 5 *Carr. & P.*, 154; *Rex v. Heass*, 2 *Salk.*, 594.

Upon the second, 1 *Hawk. P. C.*, ch. 65, § 9; 1 *Russ. Cr.*, 272; *Whart. Cr. L.*, 722; *Rex v. Hunt*, 1 *Russ. C. & M.*, 254; 3 *Cox Cr. Cas.*, 215; *Reg. v. Vincent*, 9 *Carr. & P.*, 91; *Reg. v. Neale*, 9 *Carr. & P.*, 431; *Reg. v. Soley*, 11 *Mod.*, 116; *Gagarty v. Queen*, 3 *Cox Cr. Cas.*, 306.

Assembly  
of persons  
disguised.

§ 478. Every assembly of three or more persons having their faces painted, discolored, colored or concealed, or being otherwise disguised in a manner adapted to prevent them from being identified, is an unlawful assembly.

*Laws of 1845*, ch. 3, § 6.

Punish-  
ment of  
rout and  
unlawful  
assembly

Allowing  
masquer-  
ades to be

§ 479. Every person who participates in any rout or unlawful assembly, is guilty of a misdemeanor.

§ 480. Every person being a proprietor, manager or keeper of any theater, circus, public garden, pub-

lic hall or premises, or other place of public meeting, resort or amusement whatever, for admission to which any price or payment is demanded, who permits therein any masquerade, or masked ball, or any assemblage of persons masked, is guilty of a misdemeanor, punishable by imprisonment in a state prison not exceeding two years, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars and not less than two thousand five hundred dollars, or by both such fine and imprisonment.

held in  
places of  
public  
resort.

*Laws of 1829, ch. 270; as amended Laws of 1858,  
ch. 359.*

§ 481. Every person remaining present at the place of any riot, rout or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Remaining  
present at  
place of  
riot, &c.,  
after warn-  
ing to dis-  
perse.

§ 482. Where three or more persons assemble for a lawful purpose, and afterwards proceed to commit an act that would amount to riot if it had been the original purpose of the meeting, every person who does not retire when the change of purpose is made known, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Remaining  
present at  
place of a  
meeting,  
originally  
lawful, after  
it has adop-  
ted an un-  
lawful pur-  
pose

§ 483. Every person present at any riot, and lawfully commanded to aid the magistrates or officers in arresting any rioter, who neglects or refuses to obey such command, is deemed one of the rioters, and punishable accordingly.

Refusing to  
obey a law-  
ful com-  
mand to  
assist in  
arresting  
rioter.

See *Rep. Code Cr. Pro.*, § 90.

§ 484. Every person who resists, or enters into a combination with any other person to resist the execution of any legal process, under circumstances not amounting to a riot, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both.

Combi-  
na-tions to re-  
sist exec-  
ution of pro-  
cess.

*Laws of 1845, ch. 69, § 17.*

**Prize fights.** § 485. Every person who engages in, instigates, encourages or promotes, any ring or prize fight, or any other premeditated fight or contention, whether as principal, aid, second, umpire, surgeon, or otherwise, although no death or personal injury ensues, is guilty of a misdemeanor.

**Challenges to engage in prize fights.** § 486. Every person who challenges another to engage in any such fight as is specified in the last section; every person who accepts any such challenge; every person who knowingly forwards, carries or delivers any such challenge; and every person who bets, stakes or wagers any money or property upon the result of any such fight, or who undertakes to hold any money or property so betted, staked or wagered, to be delivered to or for the benefit of the winner thereof, is guilty of a misdemeanor.

**What is a challenge.** § 487. Any words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply a desire, request, invitation or demand to engage in any fight, such as is mentioned in section 485, are deemed a challenge within the meaning of the last section.

Corresponds with § 298 of this Code.

**Leaving the state to engage in prize fights.** § 488. Every person who leaves this state with intent to elude any of the provisions of the last three sections, and to commit any act out of this state, such as is prohibited by them, and who does any act which would be punishable under these provisions if committed within this state, is punishable in the same manner as he would have been in case such act had been committed within this state.

Corresponds with § 301 of this Code.

**Place of trial.** § 489. Such person may be indicted and tried in any county within this state.

Corresponds with § 302 of this Code.

§ 490. It is the duty of all sheriffs, constables, policemen, and watchmen, who have reasonable grounds to believe that any offense specified in section 485 is about to be committed within their jurisdiction, to make complaint under the provisions of this act to some magistrate within their jurisdiction.

Special duty of peace officers with respect to prize fights.

*Laws of 1859, ch. 37, § 4.*

§ 491. Every sheriff, constable, policeman or watchman, who willfully neglects the duty prescribed by the last section, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits his office.

Neglect of duty by peace officers a misdemeanor.

*Laws of 1859, ch. 37, § 4.*

§ 492. Every person guilty of using, or of procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and manner allowed by law, is guilty of misdemeanor.

Forcible entry and detainer.

§ 493. Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterwards, without authority of law, returns to settle or reside upon such lands, is guilty of a misdemeanor.

Returning to take possession of lands after being removed by legal process.

Founded upon 1 Rev. Stat., 206, § 54, but made more general.

§ 494. Every person who intrudes or squats upon any lot or piece of land within the bounds of any incorporated city or village, without license or authority from the owner thereof, or who erects or occupies thereon any hut, hovel, shanty or other structure whatever without such license or authority; and every person who places, erects, or occupies within the bounds of any street or avenue of such city or village, any hut, hovel, shanty, or other structure whatever, is guilty of a misdemeanor.

Unlawful intrusions upon lands of another.

See *Laws of 1857, ch. 396, § 1.*

**Discharging fire-arms in public places.**

§ 495. Every person who willfully discharges any species of fire-arms, air-gun or other weapon, or throws any other missile in any public place, or in any place where there is any person to be endangered thereby, although no injury to any person shall ensue, is guilty of a misdemeanor.

**Witness' privilege.**

§ 496. No person shall be excused from giving any evidence upon any investigation or prosecution for any of the offenses specified in this chapter, upon the ground that such testimony or evidence might tend to convict him of a crime. But such answer or evidence shall not be received against him upon any criminal proceeding or prosecution.

See *Laws of 1860*, ch. 141. That act applies only to prosecutions for prize fighting; but the reasons which render it proper in connection with that offense apply equally in the case of other crimes committed by numbers acting in concert, such as are specified in this chapter.

## TITLE XIV.

### OF CRIMES AGAINST THE REVENUE AND PROPERTY OF THE STATE.

- SECTION 497. Embezzlements and falsification of accounts by public officers.
- 498. Other violations of law.
- 499. Officer authorized to make any sale, lease or contract, becoming interested under it.
- 500. County clerks omitting to publish statement required by law.
- 501. Obstructing officer in collecting revenue.
- 502. Selling goods by auction without filing the bond required by the Political Code.
- 503. Auctioneer accepting appointment as auctioneer in another state, or selling in another state.
- 504. Auctioneer having two places of business.
- 505. Auctioneer selling goods at other than his regular place of business.
- 506. Punishment for violating last two sections.
- 507. Selling goods without due advertisement.
- 508. What sales must be made by day.

- SECTION 509.** Auctioneer omitting to render account.  
 510. Auctioneer committing fraud or attempting to evade the provisions of the Political Code.  
 511. Delivering false bill of lading to canal collector.  
 512. Weighmaster making false entry of weight of canal boat.  
 513. Canal officer concealing frauds upon the revenue.  
 514. Willful injuries to the canals.  
 515. Drawing off water from canals.  
 516. Canal officer accepting bribe to allow water to be drawn off from canals.  
 517. Giving bribe to canal officer to obtain consent to drawing off water.  
 518. Injuries to the salt works.  
 519. Seizing military stores belonging to the state.  
 520. Making false statement in reference to taxes.

§ 497. Every public officer, and every deputy, or clerk of any such officer, and every other person receiving any moneys on behalf of, or for account of the people of this state, or of any department of the government of this state, or of any bureau or fund created by law, and in which the people of this state, are directly or indirectly interested, who either :

**Embezzle-  
ments and  
falsification  
of accounts  
by public  
officers.**

1. Appropriates to his own use, or to the use of any person not entitled thereto, without authority of law, any money received by him as such officer, clerk or deputy, or otherwise, on behalf of the people of this state or in which they are interested ; or,
2. Knowingly keeps any false account or makes any false entry or erasure in any account of or relating to any moneys so received by him, on behalf of the people of this state, or in which they are interested ; or,
3. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account ; or,
4. Willfully omits or refuses to pay over to the people of this state or their officer or agent authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same,

**Is guilty of felony.**

*Other violations of law.*

§ 498. Every officer or other person mentioned in the last section who willfully disobeys any provisions of law regulating his official conduct, in cases other than those specified in that section, is guilty of a misdemeanor.

*Officer authorized to make any sale, lease or contract, becoming interested under it.*

§ 499. Every public officer, being authorized to sell or lease any property, or make any contract in his official capacity, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, is guilty of a misdemeanor.

See *Laws of 1860*, ch. 488, § 19; *Laws of 1861*, ch. 340, § 18; *Laws of 1862*, ch. 285, § 2; also *Howell v. Barker*, 4 Johns. Ch., 118.

*County clerks omitting to publish statement required by law.*

§ 500. Any county clerk who willfully omits to publish the annual statement required by section 905 of the Political Code, within the time therein prescribed, is guilty of a misdemeanor.

*Rep. Pol. Code*, § 906.

*Obstructing officer in collecting revenue.*

§ 501. Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes or other sums of money in which, or in any part of which the people of this state are directly or indirectly interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

*Selling goods by auction without filing bond required by the Political Code.*

§ 502. Every person who acts as auctioneer in selling any goods liable to auction duties, or in selling in the cities of New York, Brooklyn, Albany, Troy or Buffalo, any personal property whatsoever, except such as is sold under authority of the United States, without having filed the bond required by the provisions of Article II of Chapter IV of Title IV of Part III of the Political Code, or being authorized as assistant to one who has filed such bond, as provided by section 723 of that Code, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits one hundred and twenty-five dollars, for each article so exposed by him to sale, to be recovered by a civil action in the name of the people.

*Rep. Pol. Code*, § 723.

§ 503. Every person who accepts an appointment as auctioneer from any other state or is concerned as principal or partner in selling any property in any other state by public auction, or who knowingly receives any benefit on account of any such sale, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor by law, is forever disqualified after his conviction therefor, from being licensed to act as an auctioneer within this state.

Auctioneer accepting appointment as auctioneer in another state, or selling in another state.

§ 504. No auctioneer, in any city of this state shall at one time have more than one place for carrying on the general business of an auctioneer; and every such auctioneer, before acting as such, shall file with the clerk of such city a writing, signed by him, designating such place and naming therein the partners, if any, engaged with him in business.

Auctioneer having two places of business.

*See Rep. Pol. Code, § 727.*

§ 505. No such auctioneer shall expose to sale by public auction any articles liable to auction duties at any other place than that so designated, except goods sold in original packages as imported, pictures, household furniture, libraries, stationery and such bulky articles as have usually been sold in warehouses, or in the public streets or on the wharves.

Auctioneer selling goods at other than his regular place of business

*Rep. Pol. Code, § 728.*

§ 506. A violation of either of the last two sections is punishable by a fine not exceeding two hundred and fifty dollars for each offense.

Punishment for violating last two sections.

*Rep. Pol. Code, § 729.*

§ 507. Every person carrying on, interested in or employed about, the business of selling property by auction in the city of New York, who sells any property by auction without having first advertised the same in the manner required by law, or is concerned in any sale by auction not so advertised, is guilty of a misdemeanor.

Selling goods without due advertisement.

*See Rep. Pol. Code, § 731. The mode of advertising auction sales is more particularly prescribed by that section.*

**What sales must be made by day.**

§ 508. All sales of goods by public auction in the cities of New York, Brooklyn, Albany, Buffalo, Oswego, Syracuse, Troy, Poughkeepsie and Rochester, shall be made in the day-time between sunrise and sunset, excepting :

1. Books, prints, pictures or stationery.
2. Goods sold in the original packages as imported, according to a printed catalogue, of which samples shall have been opened and exposed to public view at least one day previous to the sale. Every person who violates the provisions of this section is guilty of misdemeanor; and in addition to the punishment prescribed therefor by law, is forever disqualified after his conviction therefor, from being licensed to act as an auctioneer within this state.

This provision has been reported in substantially the above form in *Rep. Pol. Code*, § 732, being there restricted to the cities of New York and Albany. In view of the extension of auction business in the larger towns of the state, the Commissioners are of opinion that the section should be extended to embrace the other cities named in the text.

**Auctioneer omitting to render account.**

§ 509. Every auctioneer, and every partner or clerk of an auctioneer, and every person whatever in any way connected in business with an auctioneer, who willfully omits to render any semi-annual or other account, by law required to be rendered, at the time or in the manner prescribed by law, or who willfully omits to pay over any duties legally payable by him at the time and in the manner prescribed by law, is guilty of a misdemeanor.

*See Rep. Pol. Code*, §§ 738-748.

**Auctioneer committing fraud or attempting to evade the provisions of the Political Code.**

§ 510. Every auctioneer, and every partner or clerk of any auctioneer, and every person whatever in any way connected in business with an auctioneer, who commits any fraud or deceit, or by any fraudulent means whatever seeks to evade or defeat the provisions of Chapter IV of Title IV of Part III of the Political Code, entitled AUCTIONS, is guilty of misdemeanor;

and in addition to the punishment prescribed therefor is liable in treble damages to any party injured thereby.

*Rep. Pol. Code, § 750.*

§ 511. Every person whose duty it may be to deliver to any collector of tolls upon any of the canals belonging to this state, a bill of lading of any property transported upon any such canal, who knowingly delivers a false bill of lading as true, or makes or signs a false bill of lading intending it to be delivered as true, is punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding three times the value of any property omitted in such bill, or both.

Delivering  
false bill of  
lading to  
canal col-  
lector.

Suggested as a substitute for *Rep. Pol. Code, § 570.*  
See 1 Rev. Stat., 241, § 125.

§ 512. Every weighmaster upon any of the canals belonging to this state, and every clerk of such weighmaster, who knowingly makes a false entry of the weight of any boat, or cargo of any boat, navigating such canal, or who knowingly makes a false certificate of the light weight of any boat, is guilty of misdemeanor.

Weigh-  
master  
making  
false entry  
of weight  
of canal  
boat.

See *Laws of 1861*, ch. 124, § 4.

§ 513. Every public officer or agent employed by the people of this state in relation to the canals belonging to this state, who knows, or has good reason to believe that any fraud upon the revenues of the canals has been committed or attempted, and who omits to disclose the same, and enforce the penalties therefor, if within his power, is guilty of a misdemeanor.

Canal offi-  
cer conceal-  
ing frauds  
upon the  
revenue.

See *Laws of 1855*, ch. 534, § 4.

§ 514. Every person who, without authority of law willfully inflicts any injury upon any of the canals belonging to this state, or disturbs or injures any of the boats, locks, bridges, buildings, machinery or

Willful in-  
juries to the  
canals.

other works or erections connected with any such canal, and in which the people of this state have an interest, is guilty of felony.

See 1 Rev. Stat., 248, §§ 179, 180.

Drawing off  
water from  
canals.

**§ 515.** Every person who draws water from any canal in this state, or from any feeder or reservoir of any canal, during the navigation season of the canal, and to the detriment or injury of the navigation thereof, without authority of law, is punishable by imprisonment in a county jail not less than one year, and by fine not less than one thousand dollars.

Founded upon *Laws of 1860*, ch. 213, § 5, and intended to cover the provisions of *Laws of 1861*, ch. 124, § 5, and of 1 Rev. Stat., 235, §§ 94, 95.

Canal offi-  
cer accept-  
ing bribe to  
allow water  
to be drawn  
off from  
canals.

**§ 516.** Every public officer or agent employed by the people of this state in relation to the canals belonging to this state, or contractor for canal repairs, or person having any charge of any canal, or of any part thereof or of any lock, waste weir, feeder or other work belonging thereto, or being employed thereon, who asks, or accepts or promises to accept any bribe as an inducement to permitting water to be drawn from any canal, feeder or reservoir in violation of the last section, is guilty of a misdemeanor.

Founded upon *Laws of 1860*, ch. 213, § 5.

Giving  
bribe to  
canal officer  
to obtain  
consent to  
drawing off  
water.

**§ 517.** Every person who gives, or offers or promises to give to any officer or person mentioned in the last section, any bribe as an inducement to him to permit any water to be drawn from any canal, feeder or reservoir in violation of section 515, is guilty of a misdemeanor.

Founded upon *Laws of 1860*, ch. 213, § 5.

Injuries to  
the salt  
works.

**§ 518.** Every person who willfully burns, destroys, or injures any salt manufactory connected with the Onondaga salt springs, or any building appurtenant to such manufactory, or any part of such manufactory, or any of the buildings, reservoirs, pumps, conductors or water conduits, belonging to the state, used in the

raising of salt water for the use of the manufacturers of salt, without authority of law, is punishable by imprisonment in a state prison not exceeding five years.

Founded on *Laws of 1859*, ch. 346, § 62. That act requires that the injury to the works should be shown to have been inflicted "with intent to retard the pumping, &c., of salt water for the use of manufacturers." The words "without authority of law" are substituted for this clause, as equally consonant with justice, and imposing a less onerous burden of proof upon the prosecution.

§ 519. Every person who enters any fort, magazine, arsenal, armory, arsenal yard or encampment, and seizes or takes away any arms, ammunition, military stores or supplies belonging to the people of this state; and every person who enters any such place with intent so to do, is punishable by imprisonment in a state prison not exceeding ten years.

Seizing  
military  
stores be-  
longing to  
the state.

§ 520. Every person, who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully states any material matter which he knows to be false, is guilty of a misdemeanor.

Making  
false state-  
ments in  
reference to  
taxes.

See *Stat.*, 50 *Geo. III*, ch. 105, § 9.

# THE PENAL CODE

## TITLE XV.

### OF CRIMES AGAINST PROPERTY.

- CHAPTER I.** Arson.  
II. Burglary and housebreaking.  
III. Forgery and counterfeiting.  
IV. Larceny.  
V. Embezzlement.  
VI. Extortion.  
VII. False personation, and cheats.  
VIII. Fraudulently fitting out and destroying ships and vessels.  
IX. Fraudulent destruction of property insured.  
X. False weights and measures.  
XI. Fraudulent insolvencies by individuals.  
XII. Fraudulent insolvencies by corporations, and other frauds  
in their management.  
XIII. Frauds in the sale of passage tickets.  
XIV. Frauds relative to documents of title to merchandise.  
XV. Malicious injuries to railroads, highways, bridges and  
telegraphs.

## CHAPTER I.

### ARSON.

- SECTION.** 521. "Arson" defined.  
522. "Building" defined.  
523. "Inhabited building" defined.  
524. "Night time" defined.  
525. "Burning" defined.  
526. Ownership of the building.  
527. Variance in proof of ownership.  
528. What constitutes malice.  
529. Intent to destroy the building, requisite.  
530. Contiguous buildings.  
531. Degrees of arson.  
532. First degree defined.  
533. Appurtenances to buildings.  
534. Burning in day time, when arson in second degree.  
535. Burning in night time, when arson in second degree.  
536. Burning in day time, when arson in third degree.  
537. Burning in night time, when arson in third degree.  
538. Fourth degree defined.  
539. Punishment of arson.

§ 521. Arson is the willful and malicious burning <sup>"Arson defined."</sup> of a building, with intent to destroy it.

This definition is substantially that of the common law authorities. They, nearly all, restrict the offense to the burning of a dwelling house, or some edifice adapted for or connected with human occupation; making the gravity of the offense to consist in the peril to the person which such burning involves. (4 *Blackst. Comm.*, 220; 2 *East P. C.*, 1015; *Barb. Cr. L.*, 53; *Whart. Am. Cr. L.*, 534; *Coke Ch.*, 15, 66; *State v. Roe*, 12 *Verm.*, 93; *People v. Cotteral*, 18 *Johns.*, 115. See also *Laws of Ga.*, 712; 4 *U. S. Stat. at L.*, 115; *Rep. Cr. Code, Mass.*) The statutes of this state have enlarged the use of the term to include many acts of burning not involving special danger to the person. Thus, burning a carding machine, a stack of grain or hay, a bridge, a crop of grain, &c., &c., is arson in the fourth degree. (2 *Rev. Stat.*, 667, §§ 7, 8.) The Commissioners recommend that the term "arson" be confined to the offense of setting on fire buildings or edifices (including ships and vessels, see § 521, *infra*). Other criminal acts of burning should be classed under other titles; *e. g.*, malicious mischief. See section 703.

§ 522. Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, or appurtenant to, or connected with an erection so adapted, is a "building" within the meaning of the last section. <sup>"Building defined."</sup>

§ 523. Any building is deemed an "inhabited building" within the meaning of this chapter, any part of which has usually been occupied by any person lodging therein at night. <sup>"Inhabited building defined."</sup>

*People v. Orcutt*, 1 *Park. Cr.*, 252; See also *Hooker v. Commonwealth*, 13 *Gratt.*, 763; *Commonwealth v. Barney*, 10 *Cush.*, 478; *Rex v. Donovan*, *Leach C. C.*, 81; *Reg. v. Connor*, 2 *Cox Cr. Cas.*, 65.

§ 524. The words "night time" in this chapter include the period between sunset and sunrise. <sup>"Night time" defined.</sup>

§ 525. To constitute a burning within the meaning of section 521, it is not necessary that the building set on fire should be destroyed. It is sufficient that <sup>"Burning" defined.</sup>

fire is applied so as to take effect upon the substance of the building.

*People v. Butler*, 16 *Johns.*, 203; Commonwealth *v. Van Schaack*, 16 *Mass.*, 105; *State v. Sandy*, 5 *Ired.*, 570; *Reg. v. Parker*, 9 *Carr. & P.*, 45; *Reg. v. Russel*, 1 *Carr. & M.*, 541. See also, *Hester v. State*, 17 *Geo.*, 130; *State v. De Bruhl*, 10 *Rich. Law*, 23.

Ownership  
of the build-  
ing.

§ 526. To constitute arson it is not necessary that another person than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in the possession of, or was actually occupying, such building, or any part thereof.

*People v. Van Blarcum*, 2 *Johns.*, 105; *Shepherd v. People*, 19 *N. Y.* (5 *Smith*), 537; *State v. Taylor*, 45 *Me.*, 322. At common law arson was the maliciously burning the house of *another*. *East P. C.*, 1015. And one could not be convicted of arson in burning his own house. *Rex v. Pealey*, *Leach C. C.*, 277; *Rex v. Breeme*, *Id.*, 261; *Rex v. Spalding*, *Leach C. C.*, 248.

The offense of burning insured property with intent to defraud the insurers, is provided for in chapter IX. of this title.

Variance in  
proof of  
ownership.

§ 527. An omission to designate, or error in designating in an indictment for arson, the owner or occupant of a building, shall not prejudice the proceedings thereupon, if it appears that upon the whole description given of the building, it is sufficiently identified to enable the prisoner to prepare his defense.

Compare *Martha v. State*, 26 *Ala.*, 72; *State v. Fish*, 3 *Dutch.*, 323.

What con-  
stitutes  
malice.

§ 528. Malice sufficient to constitute arson is inferred from proof that the prisoner committed an act of burning a building, and that some other person was rightfully in possession of, or actually occupying any part thereof. It is not necessary that the accused should have had actual knowledge of such possession or occupancy, or should have intended to injure another person.

*Rex v. Farrington*, *Russ. & Ry. C. C.*, 207; *People v. Van Blarcum*, 2 *Johns.*, 105; *People v. Orcutt*, 1 *Park Cr.*, 252; *People v. Henderson*, *Id.*, 563; *Jesse v. State*,

28 *Miss.*, 100. In *Reg. v. Regan* (4 *Cox Cr. Cas.*, 335), it appeared that the prisoner's intent in setting fire to the building was to obtain a reward offered for giving the earliest intimation of a fire, at the engine station. *Held*, he was guilty of arson.

**§ 529. But the burning of a building under circumstances which shows beyond a reasonable doubt that there was no intent to destroy it, is not arson.**

*People v. Cotteral*, 18 *Johns.*, 115.

*State v. Mitchell*, 5 *Ired.*, 350.

Intent to  
destroy the  
building  
requisite.

**§ 530. Where any appurtenance to any building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other, within the foregoing definition of arson, and as against any person actually participating in the original setting fire, as of the moment when the fire from the one shall communicate to and burn the other.**

Contiguous  
buildings.

Robert's case, 2 *East P. C.*, 1030; Isaac's case, *Id.*, 1031; *Reg. v. Fletcher*, 2 *Carr. & K.*, 215; *Reg. v. Price*, 1 *Id.*, 73; *Rex v. Petley, Leach C. C.*, 277.

**§ 531. Arson is distinguished into four degrees.**

Degrees of  
arson.

**§ 532. Maliciously burning in the night time an inhabited building, in which there is at the time some human being, is arson in the first degree.**

First degree  
defined.

Founded upon 2 *Rev. Stat.*, 657, § 9. Taken in connection with the definition of "building," and "inhabited," given in sections 521 and 522 of this Code, the foregoing section would embrace as arson in the first degree, the burning of a ship or vessel while lying within this state. This is, by the Revised Statutes (2 *Rev. Stat.*, 667, § 4), only arson in the third degree; but it is an offense of as grave a character as burning an inhabited dwelling.

**§ 533. No warehouse, barn, shed, or other out-house, is a subject of arson in the first degree, unless appurtenances to buildings.**

it is immediately connected with, and forms part of, an inhabited building.

Founded upon 2 Rev. Stat., 657, § 10.

Burning in day time, when arson in second degree.

**§ 534.** Maliciously burning in the day time an inhabited building, in which there is at the time some human being, is arson in the second degree.

Substituted for 2 Rev. Stat., 666, § 1.

Burning in night time, when arson in second degree.

**§ 535.** Maliciously burning in the night time a building, not an inhabited building, but adjoining to or within the curtilage of an inhabited building in which there is at the time some human being, so that such inhabited building is endangered, even though it be not in fact injured by such burning, is arson in the second degree.

See *Peverelly v. People*, 3 Park. Cr., 59.

Burning in day time, when arson in third degree.

**§ 536.** Maliciously burning in the day time a building, the burning of which in the night time would be arson in the second degree, is arson in the third degree.

Burning in night time, when arson in third degree.

**§ 537.** Maliciously burning in the night time any building, not the subject of arson in the first or second degree, including any house for public worship, school house, or public building belonging to the people of this state, or to any county, city, town or village, any building in which have usually been deposited the papers of any public officer, and any barn, mill or manufactory, is arson in the third degree.

Founded on 2 Rev. Stat., 667, § 4.

Fourth degree defined.

**§ 538.** Maliciously burning in the day time any building, the burning of which in the night time would be arson in the third degree, is arson in the fourth degree.

Founded on 2 Rev. Stat., 667, § 7.

Punish-  
ment of  
arson

**§ 539.** Arson is punishable by imprisonment in a state prison, as follows:

1. Arson in the first degree, for any term not less than ten years;
2. Arson in the second degree, not exceeding ten years and not less than seven years;
3. Arson in the third degree, not exceeding seven years and not less than four years;
4. Arson in the fourth degree, not exceeding four years and not less than one year; or by imprisonment in a county jail not exceeding one year.

The above are the grades of punishment recently prescribed by statute, (*Laws of 1862*, ch. 197, §§ 7, 8,) as a substitute for the provisions of the Revised Statutes. Under those provisions arson was punishable, in the first degree, by death (*2 Rev. Stat.*, 656, § 1); in the second degree by imprisonment in a state prison not less than ten years; in the third degree by like imprisonment not more than ten years and not less than seven; and in the fourth degree by like imprisonment not more than seven years and not less than two, or by imprisonment in a county jail not exceeding one year. (*2 Rev. Stat.*, 667, § 9.) In view of the many and aggravated instances of this crime which have recently occurred, there seems reason to favor a return to the more stringent system of punishment prescribed by the former law. The commissioners have, however, presented the existing rules in the text, leaving the question of a restoration of those formerly in force, to the consideration of the legislature.

## CHAPTER II.

### BURGLARY AND HOUSEBREAKING.

#### SECTION 540. Burglary in first degree defined.

541. Breaking into dwelling house in the day time, burglary in second degree.
542. Breaking inner door in night time, burglary in second degree.
543. Such breaking by person lawfully in the house, burglary in second degree.
544. Breaking into dwelling house, when burglary in third degree.
545. Other burglaries of the third degree.
546. Breaking and entering dwelling, when burglary in fourth degree.
547. Breaking out of dwelling house, burglary in fourth degree.

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**SECTION 548.** Punishment of burglary.

549. Having possession of burglar's implements.  
 550. Entering buildings other than dwelling houses.  
 551. "Dwelling house" defined.  
 552. "Night time" defined.

Burglary in  
first degree  
defined.

**§ 540.** Every person who breaks into and enters in the night time the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either :

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter ; or,
2. By breaking in any other manner, being armed with any dangerous weapon, or being assisted or aided by one or more confederates, then actually present ; or,
3. By unlocking an outer door by means of false keys, or by picking the lock thereof. Is guilty of burglary in the first degree.

2 Rev. Stat., 668, § 10. It has not been thought best to insert any definition of "breaking" or of "entering," but rather to leave the meanings of those words, now quite well settled, to adjudication. For cases on the subject, see *Rex v. Cornwall*, 2 *Stra.*, 880; *Rex v. Gray*, 1 *Id.*, 481; *Rex v. Gibbons*, *Fost.*, 107; *Rex v. Hughes*, *Leach C. C.*, 452; *Reg. v. Davis*, 6 *Cox Cr. Cas.*, 367; *Reg. v. O'Brien*, 4 *Id.*, 398; *Reg. v. Meal*, 3 *Id.*, 70; *Reg. v. Wenmouth*, 8 *Cox Cr. Cas.*, 483; *Reg. v. Wheeldon*, 8 *Carr. & P.*, 747; *Rex v. Paine*, 7 *Id.*, 135; *Rex v. Jordan*, 7 *Id.*, 432; *Reg. v. Bird*, 9 *Id.*, 44; *Rex v. Hughes*, 1 *Leach C. C.*, 406; 2 *East P. C.*, 491; *Rex v. Lewis*, 2 *Carr. & P.*, 628; *Rex v. Brown*, 2 *East P. C.*, 487; 2 *Leach C. C.*, 1016; *Rex v. Johnson*, 2 *East P. C.*, 488; *Rex v. Bailey*, *Russ. & R. C. C.*, 341; 2 *Russ. C. & M.*, 12; 1 *R. & M. C. C.*, 23; *Rex v. Perkes*, 1 *Carr. & P.*, 300; *Rex v. Lawrence*, 4 *Carr. & P.*, 231; *Rex v. Russell*, 1 *M. C. C. R.*, 377; *State v. McCall*, 4 *Ala.*, 643; *State v. Wilson*, *Coxe*, 439; *Commonwealth v. Steward*, 7 *Dane's Ab.*, 136; *Com. v. Stephenson*, 8 *Pick.*, 354; *People v. Boujet*, 2 *Park. Cr. Rep.*, 11; *Commonwealth v. Trimmer*, 1 *Mass.*, 476; *Finch's case*, 14 *Gratt.*, 643; *Guche's case*, 6 *City Hall Rec.*, 1; *Robertson's case*, 4 *Id.*, 63; *Smith's case*, *Id.*, 62; *People v. Tralick*, *Hill & D.*, 63; *People v. Bush*, 3 *Park. Cr.*, 552.

**§ 541.** Every person who breaks into any dwelling house in the day time under such circumstances as would have constituted the crime of burglary in the first degree, if committed in the night time, is guilty of burglary in the second degree.

Breaking  
into dwell-  
ing house  
in the day  
time bur-  
glary in  
second  
degree.

*2 Rev. Stat., 668, § 11.*

**§ 542.** Every person who, having entered the dwelling house of another in the night time, through an open outer door or window, or other aperture not made by such person, breaks any inner door, window, partition, or other part of such house, with intent to commit any crime, is guilty of burglary in the second degree.

Breaking  
inner door  
in night  
time, bur-  
glary in  
second  
degree.

Founded upon *2 Rev. Stat., 668, § 14.*

**§ 543.** Every person who, being lawfully in any dwelling house, breaks in the night time any inner door of the same house, with intent to commit any crime, is guilty of burglary in the second degree.

Such break-  
ing by per-  
son lawfully  
in the house  
burglary in  
second  
degree.

Founded upon *2 Rev. Stat., 669, § 15.* The language of that section is: "Every person who, being admitted into any dwelling house with the consent of the occupant thereof, or who being lawfully in such house," &c. The Commissioners in omitting the words, "being admitted into any dwelling house with the consent of the occupant thereof," do not intend any substantial change in the law, but deem those words fully covered by the clause in the text; "being lawfully in any dwelling house."

**§ 544.** Every person who breaks into any dwelling house in the night time, with intent to commit a crime, but under such circumstances as do not constitute the offense of burglary in the first degree, is guilty of burglary in the third degree.

Breaking  
into dwell-  
ing house  
when bur-  
glary in  
third de-  
gree.

*2 Rev. Stat., 668, § 12; modified by reducing the offense to the third degree.*

**§ 545.** Every person who breaks and enters, in the day or in the night time, either:

Other  
burglaries  
of the third  
degree.

1. Any building within the curtilage of a dwelling house, but not forming a part thereof; or

**2.** Any building or part of any building, booth, tent, railroad car, vessel, or other structure or erection in which any property is kept, with intent to steal therein or to commit any felony,

Is guilty of burglary in the third degree.

Compare 2 *Rev. Stat.*, 669, § 17, as amended, *Laws of 1863*, ch. 244.

Breaking  
and enter-  
ing dwell-  
ing, when  
burglary in  
fourth  
degree.

**§ 546.** Every person who breaks and enters the dwelling house of another, by day or by night, in such manner as not to constitute any burglary specified in the preceding section, with intent to commit a crime, is guilty of burglary in the fourth degree.

See 2 *Rev. Stat.*, 668, § 13, which declares this species of offense to be burglary in the second degree. The section in the text also merges 2 *Rev. Stat.*, 669, § 18.

Breaking  
out of  
dwelling  
house  
burglary in  
fourth  
degree.

**§ 547.** Every person who, having committed any crime in the dwelling house of another, breaks in the night time, any outer door, window shutter, or other part of such house, to get out of the same, is guilty of burglary in the fourth degree.

See 2 *Rev. Stat.*, 668, § 13.

The following provisions of 2 *Rev. Stat.*, 669, are here omitted, not with intention to change the existing law, but because they are embraced in the general provision of § 2 of this Code.

§ 19. The breaking out of any dwelling house by any person being therein, shall not be deemed such a breaking of a dwelling house as to constitute burglary, in any case other than such as are herein particularly specified.

§ 20. The breaking of the inner door of any house by any person being therein, shall not be deemed such a breaking of a dwelling house as to constitute burglary, in any case other than such as are herein particularly specified.

Punish-  
ment of  
burglary.

**§ 548.** Burglary is punishable by imprisonment in a state prison as follows:

1. Burglary in the first degree, for any term not less than ten years;
2. Burglary in the second degree, not exceeding ten years, and not less than five;

3. Burglary in the third degree, not exceeding five years;

4. Burglary in the fourth degree, not exceeding three years.

Compare 2 *Rev. Stat.*, 669, § 21. A lesser punishment for burglary in the fourth degree, is here added to those prescribed for the higher degrees by the Revised Statutes.

**§ 549.** Every person who, under circumstances not amounting to any felony, has in his possession in the night time any dangerous, offensive weapon or instrument whatever, or any picklock, crow, key, bit, jack, jimmy, nippers, pick, betty or other implement of burglary, with intent to break and enter any building or part of any building, booth, tent, railroad car, vessel or other structure or erection and to commit any felony therein, is guilty of a misdemeanor.

Having possession of burglar's implements

See *Laws of 1862*, ch. 374, § 1.

**§ 550.** Every person who, under circumstances not amounting to any burglary, enters any building or part of any building, booth, tent, warehouse, railroad car, vessel or other structure or erection with intent to commit any felony, larceny or malicious mischief, is guilty of a misdemeanor.

Entering buildings other than dwelling houses.

See *Laws of 1862*, ch. 374, § 1.

**§ 551.** The term "dwelling house," as used in this chapter, includes every house or edifice any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such a house or edifice.

"Dwelling house" defined.

The only attempt at a definition of "dwelling house" in our existing statute law of burglary, is that found in 2 *Rev. Stat.*, 669, § 16, viz.: "No building shall be deemed a dwelling house, or any part of a dwelling house within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and part of a dwelling house." While this provision may have served a useful purpose in excluding from the provisions of the statutes relative to burglary a class of buildings wholly disconnected from dwelling

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houses, it is wholly useless as a definition. It entirely fails to designate what is to be considered a dwelling house; and indeed, if literally taken, excludes all habitations standing alone. The Commissioners have given in the text a distinct definition of the term.

"Night  
time"  
defined.

**§ 552.** The words "night time," in this chapter, include the period between sunset and sunrise.

Corresponds with § 524 of this Code, relative to arson.

## CHAPTER III.

## FORGERY AND COUNTERFEITING.

- SECTION 553.** Forgery of wills, conveyances, certificates of acknowledgment, &c.
- 554. Forgery of public securities.
  - 555. Forgery of public and corporate seals.
  - 556. Forgery of records and official returns.
  - 557. Making false entries in records or returns.
  - 558. False certificates of acknowledgment or proof.
  - 559. Making false bank note plates, &c.
  - 560. What plate may be deemed an imitation of a genuine plate.
  - 561. Uttering forged evidences of debt.
  - 562. Having possession of certain forged evidences of debt with intent to utter them.
  - 563. Having possession of other forged instruments.
  - 564. Issuing spurious certificates of stock in corporations.
  - 565. Re-issuing canceled certificates of stock.
  - 566. Issuing false evidences of debt of corporations.
  - 567. Counterfeiting coin to be circulated within this state.
  - 568. Counterfeiting coin to be exported.
  - 569. Forging process of court, and other instruments.
  - 570. Making false entries in accounts of certain public officers.
  - 571. Forging passage tickets.
  - 572. Forging United States stamps.
  - 573. Making false entries in books of accounts of corporations.
  - 574. Clerks and others making false entries, in employer's books.
  - 575. Having possession of counterfeit coin, with intent to utter.
  - 576. Punishment of forgery.
  - 577. Uttering forged instrument, or coin, forgery in same degree as making it.
  - 578. Exception, when such instrument or coin was received in good faith.
  - 579. Fraudulently signing one's own name, as that of another.
  - 580. Fraudulently indorsing one's own name.
  - 581. Erasures and obliterations.
  - 582. "Writing" and "written instruments" defined.
  - 583. Fictitious names of officers of corporations.

§ 553. Every person who, with intent to defraud, forges, counterfeits or falsely alters :

Forgery of  
wills, con-  
veyances,  
certificates  
of acknow-  
ledgment,  
&c.

1. Any will or codicil of real or personal property, or any deed or other instrument being or purporting to be the act of another, by which any right or interest in real property is or purports to be transferred, conveyed or in any way charged or affected ; or,
2. Any certificate or indorsement of the acknowledgment by any person of any deed or other instrument which by law may be recorded or given in evidence, made or purporting to have been made by any officer duly authorized to make such certificate or indorsement ; or,
3. Any certificate of the proof of any deed, will, codicil or other instrument which by law may be recorded or given in evidence, made or purporting to have been made by any court or officer duly authorized to make such certificate,

Is guilty of forgery in the first degree.

*2 Rev. Stat., 670, § 22.*

§ 554. Every person who, with intent to defraud, forges, counterfeits or falsely alters :

Forgery of  
public  
securities.

1. Any certificate or other public security, issued or purporting to have been issued under the authority of this state, by virtue of any law thereof, by which certificate or other public security, the payment of any money absolutely or upon any contingency is promised, or the receipt of any money or property acknowledged ; or,
2. Any certificate of any share, right or interest in any public stock created by virtue of any law of this state, issued or purporting to have been issued by any public officer, or any other evidence of any debt or liability of the people of this state, either absolute or contingent, issued or purporting to have been issued by any public officer ; or,
3. Any indorsement or other instrument transferring or purporting to transfer the right or interest of

## THE PENAL CODE

any holder of any such certificate, public security, certificate of stock, evidence of debt or liability, or of any person entitled to such right or interest,

Is guilty of forgery in the first degree.

*2 Rev. Stat., 670, § 23.* That section contained a clause in subd. 1, punishing also the forgery of any bill of credit heretofore issued by or under the authority of the legislature of this state, or purporting to have been so issued. As the Constitution of the United States (art. 1, § 10, subd. 1), prohibits the state from emitting any bills of credit, it seems unnecessary to continue this provision longer.

**Forgery of  
public and  
corporate  
seals.**

§ 555. Every person who, with intent to defraud, forges or counterfeits the great or privy seal of this state, the seal of any public office authorized by law, the seal of any court of record, including surrogates' seals, or the seal of any corporation created by the laws of this state or of any other state, government or country, or any other public seal authorized or recognized by the laws of this state, or of any other state, government or country, or who falsely makes, forges or counterfeits any impression purporting to be the impression of any such seal, is guilty of forgery in the second degree.

*2 Rev. Stat., 671, § 24;* extended to protect seals of foreign corporations.

**Forgery of  
records and  
official re-  
turns.**

§ 556. Every person who, with intent to defraud, falsely alters, destroys, corrupts or falsifies :

1. Any record of any will, codicil, conveyance or other instrument, the record of which is, by law, evidence ; or,
2. Any record of any judgment in a court of record, or any enrollment of any decree of a court of equity ; or,
3. The return of any officer, court or tribunal to any process of any court,

Is guilty of forgery in the second degree.

*2 Rev. Stat., 671, § 25.*

§ 557. Every person who, with intent to defraud, falsely makes, forges or alters any entry in any book of records, or any instrument purporting to be any record or return, specified in the last section, is guilty of forgery in the second degree.

Making  
false entries  
in records  
or returns.

See 2 Rev. Stat., 671, § 26.

§ 558. If any officer authorized to take the acknowledgment or proof of any conveyance of real estate, or of any other instrument which by law may be recorded, knowingly and falsely certifies that any such conveyance or instrument was acknowledged by any party thereto, or was proved by any subscribing witness, when in truth such conveyance or instrument was not acknowledged or proved as certified, he is guilty of forgery in the second degree.

False cer-  
tificates of  
acknow-  
ledgment  
or proof.

See 2 Rev. Stat., 671, § 27.

§ 559. Every person who makes or engraves, or causes or procures to be made or engraved, any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit or other evidence of debt, issued by any banking corporation or association, or individual banker, incorporated or carrying on business under the laws of this state, or of any other state, government or country, without the authority of such bank; or has or keeps in his custody or possession any such plate, without the authority of such bank, with intent to use or permit the same to be used for the purpose of taking therefrom any impression, to be passed, sold or altered; or has or keeps in his custody or possession, without the authority of such bank, any impression taken from any such plate, with intent to have the same filled up and completed for the purpose of being passed, sold or altered; or makes or causes to be made, or has in his custody or possession, any plate upon which are engraved any figures, or words, which may be used for the purpose of falsely altering any evidence of debt issued by any such bank, with the intent to use the same, or to permit them to be used

Making  
false bank  
note plates,  
etc.

for such purpose, is guilty of forgery in the second degree.

Founded upon 2 Rev. Stat., 672, § 30.

What plate  
may be  
deemed  
an imita-  
tion of a  
genuine  
plate.

§ 560. Every plate specified in the last section shall be deemed to be in the form and similitude of the genuine instrument imitated, in either of the following cases :

1. When the engraving on such plate resembles and conforms to such parts of the genuine instrument as are engraved ; or,
2. When such plate is partly finished, and the part so finished resembles and conforms to similar parts of the genuine instrument.

2 Rev. Stat., 672, § 31.

Uttering  
forged evi-  
dences of  
debt.

§ 561. Every person who sells, exchanges or delivers for any consideration any forged or counterfeited promissory note, check, bill, draft, or other evidence of debt, or engagement for the payment of money absolutely, or upon any contingency, knowing the same to be forged or counterfeited, with intent to have the same uttered or passed; or who offers any such note or other instrument for sale, exchange or delivery, for any consideration, with the like knowledge and intent; or who receives any such note or other instrument upon a sale, exchange or delivery for any consideration, with the like knowledge and intent, is guilty of forgery in the second degree.

2 Rev. Stat., 673, § 32.

Having pos-  
session of  
certain  
forged evi-  
dences of  
debt with  
intent to  
utter them.

§ 562. Every person who, with intent to defraud, has in his possession any forged, altered or counterfeit negotiable note, bill, draft or other evidence of debt, issued or purporting to have been issued by any corporation or company duly authorized for that purpose by the laws of this state, or of any other state, government or country, the forgery of which is hereinbefore declared to be punishable, knowing the same to be forged, altered or counterfeited, with intent to utter the same as true, or as false, or to

cause the same to be so uttered, is guilty of forgery in the second degree.

*2 Rev. Stat., 674, § 36.*

§ 563. Every person who has in his possession any forged or counterfeited instrument, the forgery of which is hereinbefore declared to be punishable, other than such as are enumerated in the last section, knowing the same to be forged, counterfeited or falsely altered, with intent to injure or defraud by uttering the same as true, or as false, or by causing the same to be so uttered, is guilty of forgery in the fourth degree.

Having pos-  
session of  
other forged  
instru-  
ments.

*2 Rev. Stat., 674, § 37.*

§ 564. Every officer, and every agent of any corporation or joint stock association formed or existing under or by virtue of the laws of this state, or of any other state, government or country, who, within this state, willfully signs or procures to be signed, with intent to issue, sell or pledge, or to cause to be issued, sold or pledged, or who willfully issues, sells or pledges or causes to be issued, sold or pledged, any false or fraudulent certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such corporation or association, whether of full paid shares or otherwise, or of any interest in its property or profits, or any certificate or other evidence of such ownership, transfer or interest, or any instrument purporting to be a certificate or other evidence of such ownership, transfer or interest, the signing, issuing, selling or pledging of which has not been duly authorized by the board of directors or other managing body of such corporation or association having authority to issue the same, is guilty of forgery in the second degree.

Issuing  
spurious  
certificates  
of stock in  
corpora-  
tions.

§ 565. Every officer, and every agent of any corporation or joint stock association formed or existing under or by virtue of the laws of this state, or of any other state, government or country, who within this state willfully reissues, sells or pledges, or causes to

Reissuing  
canceled  
certificates  
of stock.

be reissued, sold or pledged, any surrendered or canceled certificate, or other evidence of the ownership or transfer of any share or shares of the capital stock of such corporation or association, or of an interest in its property or profits, with intent to defraud, is guilty of forgery in the second degree.

**Issuing  
false evi-  
dences of  
debt of cor-  
poration.**

§ 566. Every officer, and every agent of any corporation, municipal or otherwise, or of any joint stock association formed or existing under or by virtue of the laws of this state, or of any other state, government or country, who within this state willfully signs or procures to be signed with intent to issue, sell or pledge, or to cause to be issued, sold or pledged, or who willfully issues, sells or pledges, or causes to be issued, sold or pledged any false or fraudulent bond or other evidence of debt against such corporation or association or any instrument purporting to be a bond or other evidence of debt against such corporation or association, the signing, issuing, selling or pledging of which has not been duly authorized by the board of directors or common council or other managing body or officers of such corporation having authority to issue the same, is guilty of forgery in the second degree.

The three preceding sections embody the substance of the provisions of 2 Rev. Stat., 676, § 49, and Laws of 1855, ch. 155, §§ 1, 2.

**Counterfei-  
ting coin to  
be circula-  
ted within  
this state.**

§ 567. Every person who counterfeits any gold or silver coin, whether of the United States or of any foreign government or country, with intent to sell, utter, use or circulate the same as genuine, within this state, is guilty of forgery in the second degree.

Proposed as a substitute for 2 Rev. Stat., 671, § 28; which is as follows: "Every person who shall be convicted of having counterfeited any of the gold or silver coins which shall be at the time current by custom or usage within this state, shall be adjudged guilty of forgery in the second degree."

**§ 568.** Every person who counterfeits any gold or silver coin, whether of the United States or of any foreign country or government, with intent to export the same, or permit them to be exported to injure or defraud any foreign government, or the subjects thereof, is guilty of forgery in the third degree.

Counterfeiting  
coin to  
be exported

Proposed as a substitute for 2 *Rev. Stat.*, 672, § 29, which is as follows: "Every person who counterfeits any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any foreign government, or the subjects thereof, is guilty of forgery in the third degree.

**§ 569.** Every person who, with intent to defraud, falsely makes, alters, forges or counterfeits:

Forging  
process of  
court, and  
other in-  
struments.

1. Any instrument in writing, being or purporting to be any process issued by any competent court, magistrate or officer; or being, or purporting to be, any pleading, proceeding, bond or undertaking filed or entered in any court; or being, or purporting to be, any certificate, order or allowance by any competent court or officer; or being, or purporting to be, any license or authority authorized by any statute; or,

2. Any instrument or writing being, or purporting to be, the act of another, by which any pecuniary demand or obligation is, or purports to be, created, increased, discharged or diminished, or by which any rights or property whatever, are or purport to be, transferred, conveyed, discharged, diminished, or in any manner affected, the punishment of which is not hereinbefore prescribed, by which false making, altering, forging or counterfeiting, any person may be affected, bound, or in any way injured in his person or property,

Is guilty of forgery in the third degree.

2 *Rev. Stat.*, 673, § 33.

**§ 570.** Every person who, with intent to defraud, makes any false entry or falsely alters any entry made in any book of accounts kept in the office of the

Making  
false entries  
in accounts  
of certain  
public  
officers.

comptroller of this state, or in the office of the treasurer, or of the state engineer and surveyor, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this state, or any county or town, or any individual, is, or purports to be, discharged, diminished, increased, created, or in any manner affected, is guilty of forgery in the third degree.

*2 Rev. Stat., 673, § 34.*

**Forging  
passage  
tickets.**

§ 571. Every person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, check or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad, or in any vessel or other public conveyance; and every person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

*See Laws of 1855, ch. 499, § 4.*

**Forging U.  
S. stamps.**

§ 572. Every person who forges, counterfeits or alters any postage or revenue stamp of the United States, or who sells, or offers, or keeps for sale, as genuine or as forged, any such stamp, knowing it to be forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

This section is new and adapted to the recent introduction of stamps under the laws of the United States. It has not been intended to draft the section so as to render punishable frauds upon the *revenue of the United States* by *using* forged stamps. That crime is left to the legislation of congress. The object of the section is solely to protect inhabitants of this state from fraudulent sales of forged stamps.

**Making  
false entries  
in books of  
account, of  
corporations.**

§ 573. Every person who, with intent to defraud, makes any false entry, or falsely alters any entry made in any book of accounts kept by any corporation

within this state, or in any book of accounts kept by any such corporation or its officers, and delivered, or intended to be delivered, to any person dealing with such corporation, by which any pecuniary obligation, claim or credit is, or purports to be, discharged, diminished, increased, created, or in any manner affected, is guilty of forgery in the third degree.

Founded upon 2 *Rev. Stat.*, 673, § 35. That section is limited to books kept by "moneyed" corporations. The Commissioners have omitted the word "moneyed," recommending that the provision be made general.

**§ 574.** Every person who, being a member or officer, or in the employment of any corporation, association or partnership, falsifies, alters, erases, obliterates or destroys any account or book of accounts or records belonging to such corporation, association or partnership, or appertaining to their business, or makes any false entries in such account or book, or keeps any false account in such business, with intent to defraud his employers, or to conceal any embezzlement of their money or property, or any defalcation, or other misconduct, committed by any person in the management of their business, is guilty of forgery in the fourth degree.

Clerks and  
others  
making  
false entries  
in employ-  
ers' books.

**§ 575.** Every person who has in his possession any counterfeit of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or by causing the same to be so uttered or passed, is guilty of forgery in the fourth degree.

Having pos-  
session of  
counterfeit  
coin, with  
intent to  
utter.

Founded upon 2 *Rev. Stat.*, 674, § 38. The words "whether of the United States or of any foreign country or government," are substituted instead of the words "which shall be at the time current in this state," to correspond with the language employed in sections 567 and 568.

**§ 576.** Forgery is punishable by imprisonment in a state prison as follows :

Punish-  
ment of  
forgery.

1. Forgery in the first degree, by imprisonment not less than ten years ;
2. Forgery in the second degree, not exceeding ten years, and not less than five ;
3. Forgery in the third degree, not exceeding five years ;
4. Forgery in the fourth degree, by imprisonment in a state prison not exceeding two years, or by imprisonment in a county jail not exceeding one year.

*2 Rev. Stat., 675, § 42.*

Uttering forged instrument, or coin, forgery in same degree as making it.

§ 577. Every person who, with intent to defraud, utters or publishes as true any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin the forging, altering or counterfeiting of which is hereinbefore declared to be punishable, knowing such instrument or coin to be forged, altered or counterfeited, is guilty of forgery in the same degree as if he had forged, altered or counterfeited the instrument or coin so uttered, except as in the next section specified.

*2 Rev. Stat., 674, § 39.*

Exception, when such instrument or coin was received in good faith.

§ 578. If it appears on the trial of the indictment, that the accused received such forged or counterfeited instrument or coin from another, in good faith, and for a good and valuable consideration, without any circumstances to justify a suspicion of its being forged or counterfeited, the jury may find the defendant guilty of forgery in the fourth degree.

*2 Rev. Stat., 674, § 40.*

Fraudulently signing one's own name as that of another.

§ 579. Every person who, with intent to defraud, makes or subscribes any instrument in his own name, intended to create, increase, discharge, defeat or diminish any pecuniary obligation, right or interest, or to transfer or affect any property whatever, and utters or passes such instrument, under the pretense that it is the act of another who bears the same name, is guilty of forgery in the same degree as if he had

forged the instrument of a person bearing a different name from his own.

*2 Rev. Stat., 674, § 41.*

§ 580. Every person who, with intent to defraud, indorses any negotiable instrument in his own name, and utters or passes such instrument, under the fraudulent pretense that it is indorsed by another person who bears the same name, is guilty of forgery in the same degree as if he had forged the indorsement of a person bearing a different name from his own.

Fraudulently indorsing one's own name.

§ 581. The total or partial erasure, or obliteration of any instrument or writing, with intent to defraud, by which any pecuniary obligation, or any right, interest or claim to property is or is intended to be created, increased, discharged, diminished or in any manner affected, is forgery in the same degree as the false alteration of any part of such instrument or writing.

Erasures and obliterations.

*2 Rev. Stat., 675, § 43.*

§ 582. Every instrument partly printed and partly written, or wholly printed with a written signature thereto, and every signature of an individual, firm or corporation, or of any officer of such body, and every writing purporting to be such signature, is a writing or a written instrument, within the meaning of the provisions of this chapter.

"Writing" and "written instrument" defined.

*2 Rev. Stat., 675, § 45.*

§ 583. The false making or forging of an evidence of debt purporting to have been issued by any corporation and bearing the pretended signature of any person as an agent or officer of such corporation, is forgery in the same degree as if such person was at the time an officer or agent of such corporation ; notwithstanding such person may never have been an officer or agent of such corporation, or notwithstanding there never was any such person in existence.

Fictitious names of officers and of corporations.

*2 Rev. Stat., 675, § 47.*

## CHAPTER IV.

## LARCENY.

SECTION 584. Larceny defined.

- 585. Larceny of lost property.
- 586. Grand and petit larceny.
- 587. Grand larceny defined.
- 588. Petit larceny.
- 589. Punishment of grand larceny.
- 590. Punishment of petit larceny.
- 591. Of grand larceny committed in dwelling house or vessel.
- 592. Of grand larceny committed in the night time, from the person.
- 593. Larceny of written instrument.
- 594. Value of passage ticket.
- 595. Securities completed, but not yet issued, declared property.
- 596. Severing and removing a part of the realty, declared larceny.
- 597. Stealing wrecked goods, &c.
- 598. Receiving stolen property.
- 599. Fraudulent consumption of illuminating gas.
- 600. Larceny committed out of this state.

Larceny  
defined.

§ 584. Larceny is the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof.

Four of the crimes affecting property, require to be somewhat carefully distinguished: robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the Commissioners, may be briefly stated thus: All four include the criminal acquisition of the property of another. In robbery this is accomplished by means of force or fear, and by overcoming or disregarding the will of the rightful possessor. There is a taking of property from another against his consent; the physical power to resist being overcome by force, or what is equivalent in law, the moral power to refuse being prostrated by fear. In larceny there is still a taking; but it is accomplished by fraud or stealth; the property is taken, not *against* the consent of the owner, but *without* it. In extortion there is again a taking. Now it is *with* the consent of the party injured; but this is a consent induced by threats, or under color of some official right. In embezzlement there is no taking, in the technical sense; that is, no taking from the possession of another. The offender

being in possession of the property in virtue of some trust, which the law deems worthy of special sanction, applies it by fraud or stealth to his own use. Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

In larceny it is not necessary that the property taken should be strictly the property of another person. A man may be guilty of stealing his own property, when done with intent to charge another person with the value of it; *e. g.*, where property which has been levied upon is stolen from the officer by the general owner. *Palmer v. People*, 10 *Wend.*, 165; see also *People v. Call*, 1 *Den.*, 120.

As to what property may be the subject of larceny, see *Rex v. Westbee, Leach*, 15; *Rex v. Hedge, Id.*, 240; *Rex v. Martin, Id.*, 205; *Rex v. Cheafor, 2 Den. & P.*, 361; 5 *Cox Cr.*, 367; *Reg. v. White, 6 Cox Cr. Cas.*, 213; 7 *Id.*, 183; *Reg. v. Smith, Id.*, 93; *Reg. v. Jones, Id.*, 498; *Reg. v. Morrison, 8 Cox Cr. Cas.*, 194; *Linenden's Case*, 1 *City H. Rec.*, 30; *Ward v. People, 6 Hill*, 144; *People v. Caryl, 12 Wend.*, 547; *Johnson v. People, 4 Den.*, 364; *Low v. People, 2 Park. Cr.*, 37; *People v. Loomis, 4 Den.*, 380; *Payne v. People, 6 Johns.*, 103; *People v. Campbell, 4 Park. Cr.*, 386; *People v. Bradley, Id.*, 245; *Corbett v. State, 31 Ala.*, 329; *State v. Hall, 5 Harring.*, 492; *State v. Bond, 8 Clarke*, 540; *Commonwealth v. Rourke, 10 Cush.*, 397; *State v. Taylor, 3 Dutch.*, 117.

As to what constitutes a sufficient removal or asportation of the property to constitute larceny, see *Rex v. Coslet, Leach*, 271; *Rex v. Lapier, Id.*, 360; *Rex v. Farrell, Id.*, 362, n.; *Rex v. Simpson, Id.*, 362, n.; *Tobias' Case, 1 City Hall Rec.*, 30; *Philip's Case, 4 Id.*, 177; *McDowell's Case, 5 Id.*, 94; *Scott's Case, Id.*, 169; *Reg. v. Hall, 3 Cox Cr. Cas.*, 245; *Reg. v. Wallis, Id.*, 67; 10 *Law T.*, 49; *Reg. v. Lawrence, 4 Cox Cr. Cas.*, 438; *Reg. v. Simpson, 6 Id.*, 422; 24 *Law J. (m. c.)*, 7.

As to what is an intent to deprive another of his interest in the property taken, within the meaning of the law of larceny, see *Reg. v. Wynn, 3 Cox Cr. Cas.*, 269; 1 *Den. C. C. R.*, 365; *Reg. v. Holloway, 3 Cox Cr. Cas.*, 241; 1 *Den. C. C. R.*, 370; *Reg. v. Beecham, 5 Cox Cr. Cas.*, 181; *Reg. v. O'Donnell, 7 Id.*, 337; *Reg. v. Pooie, Id.*, 373; *Reg. v. Guernsey, 1 Fost. & F.*, 394; *Crocheron's Case, 1 City Hall Rec.*, 177; *Ellis v. People, 21 How. Pr.*, 356; *State v. Bond, 8 Clarke*, 540; *Hamilton v. State, 35 Miss.*, 214; *State v. Gresser, 19 Mis.*, 247; *U. S. v. Durkee, 1 McAll. C. C.*, 196; *Alexander v. State, 12 Tex.*, 540; *Dignowity v. State, 17 Tex.*, 521.

For cases upon the distinction between a taking originally felonious, and which is therefore larceny, and a possession acquired without intent to steal, and followed by a wrongful appropriation, see *Rex v. Bass, Leach*,

285; *Rex v. Chipchase*, *Id.*, 805; *Rex v. Palmer*, *Id.*, 782; *Rex v. Sharpless*, *Id.*, 108; *Rex v. Aickles*, *Id.*, 330; *Rex v. Harvey*, *Id.*, 528; *Rex v. Charlewood*, *Id.*, 756; *Rex v. Pear*, *Id.*, 253; *Rex v. Tunnard*, *Id.* 255, n.; *Rex v. Semple, Leach*, 470; *Rex v. Wilkins*, *Id.*, 586; *Reg. v. Cole*, 2 *Cox Cr. Cas.*, 340; *Reg. v. Thistle*, 3 *Id.*, 573; *Reg. v. Hey*, 3 *Id.*, 582; *Reg. v. Roberts*, *Id.*, 74; *Reg. v. Janson*, *Id.*, 82; *Reg. v. Brockett*, 4 *Id.*, 274; *Reg. v. Mattheson*, 5 *Id.*, 276; *Reg. v. Webb*, *Id.*, 154; *Reg. v. Medland*, *Id.*, 292; *Reg. v. Jones*, *Id.*, 156; *Reg. v. Peyer*, *Id.*, 241; *Reg. v. Johnson*, *Id.*, 372; *Reg. v. Saward*, *Id.*, 295; *Reg. v. Riley*, 6 *Id.*, 88; *Reg. v. Featherstone*, *Id.*, 376; *Reg. v. Cornish*, *Id.*, 432; 33 *Eng. L. & Eq.*, 527; *Reg. v. Fitch*, 7 *Cox Cr. Cas.*, 269; *Reg. v. Davis*, 2 *Jur. (N. S.)*, 478; 36 *Eng. L. & Eq.*, 607; *Reg. v. Wright*, 7 *Cox Cr. Cas.*, 413; 4 *Jur. (N. S.)*, 313; *Reg. v. Brown*, 36 *Eng. L. & Eq.*, 610; 2 *Jur. (N. S.)*, 192; *Reg. v. Poole*, 7 *Cox Cr. Cas.*, 373; *Reg. v. Williams*, *Id.*, 355; *Reg. v. North*, 8 *Id.*, 433; *Reg. v. Bramley*, *Id.*, 468; *Reg. v. Thompson*, 15 *Law T.*, 101; *Reg. v. Guernsey*, 1 *Fost. & F.*, 394; *Reg. v. Gillings*, *Id.*, 36; *Reg. v. Hooper*, *Id.*, 85; *Mourey v. Walsh*, 8 *Cow.*, 238; *Ross v. People*, 5 *Hill.*, 294; *Dayton's Case*, 2 *City H. Rec.*, 167; *Dow's Case*, *Id.*, 129; *Lloyd's Case*, *Id.*, 132; *McClure's Case*, *Id.*, 154; *O'Terre's Case*, *Id.*, 154; *Valentine's Case*, 4 *Id.*, 33; *Bowen's Case*, *Id.*, 46; *Langley's Case*, *Id.*, 159; *Bartrons' Case*, 6 *Id.*, 56; *Cochran's Case*, *Id.*, 62; *People v. Jackson*, 3 *Park. Cr.*, 590; *People v. Wood*, 2 *Id.*, 22; *People v. Call*, 1 *Den.*, 120; *Nichols v. People*, 17 *N. Y.*, 114; *People v. Schuyler*, 6 *Cow.*, 572; *Ennis v. State*, 3 *Iowa*, 67; *Spivey v. State*, 26 *Ala.*, 79; *Commonwealth v. King*, 9 *Cush.*, 284; *Commonwealth v. White*, 11 *Id.*, 483; *Richards v. Commonwealth*, 13 *Gratt.*, 803; *Welsh v. People*, 17 *Ill.*, 339; *Farrell v. People*, 16 *Id.*, 506; *White v. State*, 11 *Tex.*, 469; *Watson v. State*, 36 *Miss.*, 593.

Larceny of  
lost pro-  
perty.

§ 585. One who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made such effort to find the owner and restore the property to him as the circumstances render reasonable and just, is guilty of larceny.

See *Reg. v. Dixon*, 36 *Eng. L. & Eq.*, 597; *Reg. v. York*, 3 *Cox Cr. Cas.*, 181; 18 *L. J. (M. C.)*, 38; *Reg. v. Thorburn*, 3 *Cox Cr. Cas.*, 453; *Reg. v. Preston*, 5 *Id.*, 390;

Reg. *v.* Pierce, 6 *Id.*, 117; Reg. *v.* West, *Id.*, 415; Reg. *v.* Shea, 7 *Id.*, 147; Reg. *v.* Dixon, *Id.*, 35; Reg. *v.* Christopher, 8 *Id.*, 91; Reg. *v.* Moore, *Id.*, 416; Reg. *v.* Vincent, 11 *Law T.*, 374; People *v.* Anderson, 14 *Johns.*, 294; People *v.* McGarren, 17 *Wend.*, 460; People *v.* Swan, 1 *Park Cr.*, 9; People *v.* Cogdell, 1 *Hill*, 94; People *v.* Kaatz, 3 *Park Cr.*, 129; State *v.* McCann, 19 *Mis.*, 249; State *v.* Martin, 28 *Mis.*, 530; Pritchett *v.* State, 2 *Sneed*, 285; Tanner's Case, 14 *Gratt.*, 635.

**§ 586.** Larceny is divided into two degrees; the first of which is termed grand larceny, the second petit larceny.

Grand and  
petit  
larceny.

The use of the terms "grand" and "petit" larceny is so interwoven with the law of this subject, that it is expedient to retain them; but a provision describing them as "degrees" of the offense, is necessary to render the provisions of section 9 of this Code applicable to this crime.

**§ 587.** Grand larceny is larceny committed in either of the following cases:

Grand lar-  
ceny defined

1. When the property taken is of value exceeding twenty-five dollars;
2. When such property, although not of value exceeding twenty-five dollars in value, is taken from the person of another.

See 2 *Rev. Stat.*, 679, § 63; *Laws of 1860*, ch. 508, § 33; *Laws of 1862*, ch. 374, § 2. The provision of section 3 of the latter statute, that "every person who shall lay hand upon the person of another, or upon the clothing upon the person of another, with intent to steal under such circumstances as shall not amount to an attempt to rob, or an attempt to commit larceny, shall be deemed guilty of an assault with intent to steal, and shall be punished as now provided by law for the punishment of misdemeanors," is omitted as unnecessary, as section 307 of this Code makes the assault itself punishable, and no case can well arise in which the evidence requisite to support an indictment for an assault with intent to steal under the act of 1862 would not be enough to sustain a prosecution for an assault under the provisions of the Code.

**§ 588.** Larceny in other cases is petit larceny.

Petit lar-  
ceny.

**§ 589.** Grand larceny is punishable by imprisonment in a state prison not exceeding five years.

Punish-  
ment of  
grand lar-  
ceny.

See 2 *Rev. Stat.*, 679, § 63; and 2 *Rev. Stat.*, 690, § 1.

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### § 590. Petit larceny is punishable as a misdemeanor.

By the present law (*2 Rev. Stat.*, 690, § 1), the punishment prescribed for petit larceny, is imprisonment in a county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or both. The above section involves, therefore, a discretionary power, in the court, to impose an increased punishment. The change is suggested with a view to render the system of punishment prescribed by this Code, as a whole, more simple and harmonious.

grand  
larceny  
committed  
in dwelling  
house or  
vessel.

### § 591. When it appears upon the trial of an indictment for grand larceny that the larceny alleged was committed in any dwelling house or vessel, the offender may be punished by imprisonment in a state prison not exceeding eight years.

*See 2 Rev. Stat.*, 679, § 64.

of grand  
larceny  
committed  
in the night  
time from  
the person.

### § 592. When it appears upon such trial, that such larceny was committed by stealing in the night time, from the person of another, the offender may be punished by imprisonment in a state prison not exceeding ten years.

*2 Rev. Stat.*, 679, § 65.

Larceny of  
written  
instrument.

### § 593. If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property, the title to which is shown thereby, or the sum which might be recovered in the absence thereof, as the case may be, shall be deemed the value of the thing stolen.

The language of our present statute on this subject as follows: "If the property stolen consist of any bond, covenant, note, bill of exchange, draft, order or receipt or any other evidence of debt, or of any public security issued by the United States, or by this state, or of any instrument whereby any demand, right or obligation be created, increased, released, extinguished or satisfied" (except, &c.), "the money due thereon or secured thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property transferred or affected thereby"

case may be, shall be deemed the value of the article so stolen." 2 *Rev. Stat.*, 679, § 66. The commissioners consider the principle proper to be extended to all writings affecting rights of property.

*Omitted provisions.* The provisions of 2 *Rev. Stat.*, 680, §§ 69 and 70, relative to stealing documents from file or record in public offices, are omitted here, for the reason that they are embraced in sections 147 and 148 of this Code.

**§ 594.** If the thing stolen is any ticket, or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad, or in any vessel or other public conveyance, the price at which tickets entitling a person to a like passage, are usually sold by the proprietors of such conveyance, shall be deemed the value of such ticket. Value of passage ticket.

See *Laws of 1855*, ch. 499, §§ 1 and 2.

*Lottery Tickets.* The Revised Statutes contain a provision, in substance, that if the property stolen consist of a ticket in any lottery authorized by the laws of this state, and is stolen *before* the drawing of the lottery, the price paid for the ticket shall be deemed its value; if stolen *after* the drawing the amount due and payable to the holder shall be deemed the value. 2 *Rev. Stat.*, 679, § 67. This was proper while the law of the state authorized some kinds of lotteries. But as provisions are elsewhere reported prohibiting all lotteries (see sections 370-384), and all dealing in lottery tickets within the state, it seems proper that such tickets should no longer be recognized as property which can be the subject of larceny. The provision of the Revised Statutes above referred to is therefore omitted.

**§ 595.** All the provisions of this chapter shall apply where the property taken is an instrument for the payment of money, evidence of debt, public security or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner. Securities completed, but not yet issued, declared property.

See *Laws of 1855*, ch. 499, § 3.

**§ 596.** All the provisions of this chapter shall apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, Severing and removing a part of the realty, declared larceny.

## THE PENAL CODE

in the same manner as if such thing had been severed by another person at some previous time.

Substituted for 2 *Rev. Stat.*, 679, § 68, which is as follows: "If any person shall sever from the soil of another any produce growing thereon of the value of more than twenty-five dollars, or shall sever from any building, or from any gate, fence, or other railing or enclosure, any part thereof, or any material of which it is formed, of the like value, and shall take and convert the same to his own use, with the intent to steal the same, he shall be deemed guilty of larceny in the same manner, and of the same degree as if the articles so taken had been severed at some previous and different time."

Stealing  
wrecked  
goods, &c.

§ 597. Every person who takes away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, or who knowingly becomes possessed of any such, and does not deliver the same, within forty-eight hours thereafter, to the sheriff or one of the coroners or wreck masters of the county where the same were found, is guilty of a misdemeanor.

*Rep. Pol. Code*, § 304.

Receiving  
stolen pro-  
perty.

§ 598. Every person who buys or receives, in any manner, upon any consideration, any personal property of any value whatsoever, that has been stolen from any other, knowing the same to have been stolen, is punishable by imprisonment in a state prison not exceeding five years, or in the county jail not exceeding six months, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.

2 *Rev. Stat.*, 680, § 71. This provision of the Revised Statutes is immediately followed by a section as follows: "In any indictment for any offense specified in this section, it shall not be necessary to aver, nor on the trial thereof to prove, that the principal who stole such property has been convicted." 2 *Rev. Stat.*, 680, § 72. This provision is here omitted merely as not being within the scope of the Penal Code. The principle embodied is questionable, and the section should be transferred to the Code of Criminal Procedure, to follow section 31.

Fraudulent  
consuming  
of illumi-  
nating  
gas.

§ 599. Every person who, with intent to defraud, makes or causes to be made any pipe or other

ment or contrivance, and connects the same, or causes it to be connected with any pipe laid for conducting illuminating gas, so as to conduct gas to a point where the same may be consumed without its passing through the meter provided for registering the quantity consumed, or in any other manner so as to evade paying therefor, and every person who with like intent injures or alters any gas meter, or obstructs its action, is guilty of a misdemeanor.

See *Laws of 1854*, ch. 109, § 1; *Laws of 1859*, ch. 311, § 11; *Reg. v. White*, 6 *Cox Cr. Cas.*, 213.

§ 600. Every person who steals the property of another in any other state or country, and brings the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state; and such larceny may be charged to have been committed in any town or city into or through which such stolen property has been brought.

Larceny  
committed  
out of this  
state.

2 *Rev. Stat.*, 698, § 4.

## CHAPTER V.

### **EMBEZZLEMENT.**

#### SECTION 601. "Embezzlement" defined.

- 602. When officer, &c., of any association, guilty of embezzlement.
- 603. When carrier, or other person having property for transportation for hire, guilty of embezzlement.
- 604. When trustee, banker, &c., &c., guilty of embezzlement.
- 605. When bailee guilty of embezzlement.
- 606. When clerk or servant guilty of embezzlement.
- 607. Distinct act of taking, not necessary to constitute embezzlement.
- 608. Evidence of debt undelivered, may be subject of embezzlement.
- 609. Claim of title a ground of defense.
- 610. Intent to restore the property is no defense.
- 611. But actual restoration is a ground for mitigation of punishment.
- 612. Punishment for embezzlement.

"Embezzlement" defined.

**§ 601. Embezzlement** is the fraudulent appropriation of property by a person to whom it has been entrusted.

As to the distinctions between robbery, larceny, embezzlement and extortion, see notes to sections 280 and 584.

When officer, &c., of any association, guilty of embezzlement.

**§ 602.** If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation (public or private), fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control in virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement.

This chapter embodies a considerable extension of our existing law relative to embezzlement. Several of the provisions reported are founded upon, or suggested by those of the recent English statutes, 24 and 25 Vict., ch. 96.

When carrier, or other person, having property for transportation for hire, guilty of embezzlement.

**§ 603.** If any carrier or other person having under his control personal property for the purpose of transportation for hire, fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, he is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not.

When trustee, banker, &c., guilty of embezzlement.

**§ 604.** If any person, being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector, or being otherwise entrusted with or having in his control property for the use of any other person, or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement.

When bailee guilty of

**§ 605.** If any person being entrusted with any property as bailee, or with any power of attorney for

the sale or transfer thereof, fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, he is guilty of embezzlement, whether he has broken the package or otherwise determined the bailment or not.

**§ 606.** If any clerk or servant of any private person or copartnership or corporation (except apprentices and persons within the age of eighteen years), fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of any other person which has come into his control or care by virtue of his employment as such clerk or servant, he is guilty of embezzlement.

See 2 Rev. Stat., 678, § 59.

**§ 607.** A distinct act of taking is not necessary to constitute embezzlement; but any fraudulent appropriation, conversion or use of the property, coming within the above prohibitions, is sufficient.

People v. Dalton, 15 Wend., 581.

**§ 608.** Any evidence of debt, negotiable by delivery only, and actually executed, is equally the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not.

2 Rev. Stat., 678, § 60.

**§ 609.** Upon any indictment for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision shall not excuse the retention of the property of another to offset or pay demands held against him.

**§ 610.** The fact that the accused intended to restore the property embezzled, is no ground of defense, or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense.

**But actual restoration is a ground for mitigation of punishment.**

**§ 611.** Whenever it is made to appear that prior to any information laid before a magistrate, charging the commission of embezzlement, the person accused voluntarily and actually restored or tendered restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense to the indictment, but it authorizes the court to mitigate punishment in its discretion.

**Punish-  
ment for  
embezzle-  
ment.**

**§ 612.** Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled. And where the property embezzled is an evidence of debt or right in action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

Founded upon 2 Rev. Stat., 678, § 59.

## CHAPTER VI.

### EXTORTION.

#### SECTION 613. "Extortion" defined.

- 614. What threats may constitute extortion.
- 615. Punishment of extortion in certain cases.
- 616. Punishment of extortion committed under color of official right.
- 617. Obtaining signature by means of threats.
- 618. Sending threatening letters.
- 619. Attempts to extort money, or property, by verbal threats.

**"Extor-  
tion" de-  
fined.**

**§ 613.** Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

See note to section 584; also, as to extortion under color of official right, *People v. Whaley*, 6 Cow., 661.

**What  
threats  
may consti-  
tute extor-  
tion.**

**§ 614.** Fear, such as will constitute extortion, may be induced by a threat, either:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or member of his family; or,
2. To accuse him, or any relative of his or member of his family, of any crime; or,

3. To expose, or impute to him, or them, any deformity or disgrace; or,
4. To expose any secret affecting him or them.

§ 615. Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or any threat such as is mentioned in the last section, is punishable by imprisonment in a state prison not exceeding five years.

Punish-  
ment of  
extortion  
in certain  
cases.

§ 616. Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed by this Code or by some of the statutes which it specifies as continuing in force, is guilty of a misdemeanor.

Punish-  
ment of  
extortion  
committed  
under color  
of official  
right.

§ 617. Every person, who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge or right of action created, is punishable in the same manner as if the actual delivery of such property or payment of the amount of such debt, demand, charge or right of action, were obtained.

Obtaining  
signature  
by means  
of threats.

§ 618. Every person who, with intent to extort any money or other property from another, sends to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat, such as is specified in section 614, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Sending  
threatening  
letters.

Suggested as a substitute for the provisions of 2 Rev. Stat., 678, § 58, which are as follows: "Every person who shall knowingly send or deliver, or shall make, and for the purpose of being delivered or sent, shall part with the possession of any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name,

or with any letter, mark or other designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of any one, with a view or intent to extort or gain any money or property of any description belonging to another, shall, upon conviction, be adjudged guilty of an attempt to rob, and shall be punished by imprisonment in a state prison not exceeding five years."

Attempts  
to extort  
money, or  
property,  
by verbal  
threats.

**§ 619.** Every person who unsuccessfully attempts by means of any verbal threat, such as is specified in section 614, to extort money or other property from another, is guilty of a misdemeanor.

Compare 2 *Rer. Stat.*, 690, § 2.

## CHAPTER VII.

### FALSE PERSONATION, AND CHEATS.

**SECTION 620.** Falsely personating another.

- C21. Receiving property in false character.
- C22. Personating officers, firemen, and other persons.
- 623. Obtaining property by false pretenses.
- 624. Obtaining property for charitable purposes.
- 625. Obtaining negotiable evidence of debt by false pretenses.
- 626. Using false check or order for payment of money.
- 627. Mock auctions.

Falsely  
personau-  
ting an-  
other.

**§ 620.** Every person who falsely personates another and in such assumed character, either

1. Marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of such other person; or,
2. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or,
3. Subscribes, verifies, publishes, acknowledges or proves, in the name of another person, any written instrument, with intent that the same may be delivered or used as true; or,
4. Does any other act, whereby if it were done by the person falsely personated, he might in any event

become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty, or whereby any benefit might accrue to the party personating, or to any other person,

Is punishable by imprisonment in a state prison not exceeding ten years.

See 2 *Rev. Stat.*, 676, § 48.

§ 621. Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person who is not entitled thereto, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

Receiving  
property  
in false  
character.

See 2 *Rev. Stat.*, 676, § 50.

§ 622. Every person who falsely personates any public officer, civil or military, or any fireman, or any private individual having special authority by law to perform any act affecting the rights or interests of another, or assumes, without authority, any uniform or badge by which such are usually distinguished, and in such assumed character does any act whereby another person is injured, defrauded, vexed or annoyed, is guilty of a misdemeanor.

Personat-  
ing offi-  
cers, fire-  
men and  
other per-  
sons.

§ 623. Every person who, with intent to cheat or defraud another, designedly, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money or property, is punishable by imprisonment in a state prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment.

Obtaining  
property  
by false  
pretenses.

See 2 *Rev. Stat.*, 677, § 53.

The words by "color or aid of any false token," &c., are employed in this and the next section instead of the

words "by color of," &c., used in our existing statutes, in order that it may be clear that cases are embraced in which a false pretense is used in aid of the fraud, but such pretense is not the controlling inducement operative upon the mind of the party defrauded. At present, it is well settled that a mere assertion may be a "false pretense;" but it must be an untrue assertion of an existing fact, not a representation or promise as to the future (People *v.* Tompkins, 1 *Park. Cr.*, 224; State *v.* Magee, 11 *Ind.*, 154; Dillingham *v.* State, 5 *Ohio (N. S.)*, 280); and it must be one adapted under the circumstances to deceive, notwithstanding the use of ordinary care and caution in giving credence to it (People *v.* Williams, 4 *Hill*, 9; People *v.* Wood, 10 *N. Y. Leg. Obs.*, 61; People *v.* Stetson, 4 *Barb.*, 151); and it must have actually influenced the defrauded person to part with his property; for if the prosecutor knew the representation to be false at the time of parting with the property (Reg. *v.* Mills, 7 *Cox Cr. Cas.*, 263; 40 *Eng. L. & Eq.*, 562); or if he disregarded the pretense and relied on his own examination as to the fact in question (Reg. *v.* Roebuck, 7 *Cox Cr. Cas.*, 126; 2 *Jur. (N. S.)*, 597; 36 *Eng. L. & Eq.*, 631), the indictment cannot be sustained. These rules the Commissioners do not propose to disturb. But it is further held that though the false pretense need not be the *only* inducement influential with the injured party, it must be the *controlling* one. (People *v.* Crissie, 4 *Dent.*, 525; see also People *v.* Haynes, 11 *Wend.*, 557; People *v.* Herrick, 13 *Id.*, 87.) This rule sometimes leads to a failure of justice; as, for instance, in the late case of Ranney *v.* People (22 *N. Y.*, 413). In that case the accused represented to one Hock that he had employment for him at a distance in traveling to collect money and do other business; and he promised to give him certain wages therefor, upon condition that Hock should deposit with the accused one hundred dollars as security for his faithful performance of duty. It was held that, although the representation and promise were false and fraudulent, an indictment could not be sustained. "There must be," say the court, "a direct and positive false assertion as to some existing matter by which the victim is induced to part with his money or property. In this case the material thing was the promise of the accused to employ the person defrauded and to pay him for his services. There was a statement, it is true, that the prisoner had employment which he could give to Hock; but this was obviously of no importance without the contract which was made. The false representation complained of was, therefore, essentially promissory in its nature, and this has never been held to be the foundation of a criminal charge."

The Commissioners doubt the soundness of this decision, even under the existing law. See *Reg. v. Bates* (3 *Cox Cr. Cas.*, 201), where it is held that an indictment which charges a false pretense of an existing fact calculated to induce the confidence which led to the prosecutor's parting with his property, though mixed up with false pretenses as to the prisoner's future conduct, is sufficient. Where the false pretense is as to the *status* of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute. See also *Reg. v. Burnside* (8 *Cox Cr. Cas.*, 370), where the indictment charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him, the prisoner, about some carpet, to wit, about twelve yards, by which, &c.; whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woolen carpet; and the evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for a family in a large house in the village, who had a daughter lately married, and thereby obtained twenty yards of carpet from him; and it was held that there was a sufficient false pretense alleged.

But conceding the decision in *Ranney v. People* to be a correct exposition of the Revised Statutes, it calls for a modification of the law. Under the language employed in the text, it will be sufficient that the false assertion cooperated with other influences to induce the prosecutor to act; that it aided the prisoner to perpetrate the fraud.

The words "money or property" are substituted in this and the preceding sections for the words "money, personal property or other valuable thing," employed in the existing statutes, as being a briefer expression of equivalent import; and without intent to change the law.

**§ 624.** Every person who designedly, by color or aid of any false token or writing, or other false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money or property for any alleged charitable or benevolent purpose whatever, is punishable by imprisonment in a state prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding the value of the money or property so obtained, or by both such fine and imprisonment.

Obtaining  
property  
for charita-  
ble pur-  
poses.

See *Laws of 1851*, ch. 144.

Obtaining  
negotiable  
evidence of  
debt by  
false pre-  
tenses.

§ 625. If the false token by which any money or property is obtained in violation of sections 623 and 624 is a promissory note or other negotiable evidence of debt purporting to be issued by or under the authority of any banking company or corporation not in existence, the person guilty of such cheat is punishable by imprisonment in a state prison not exceeding seven years, instead of by the punishments prescribed by those sections.

See 2 Rev. Stat., 677, § 54.

Using false  
check or  
order for  
payment of  
money.

§ 626. The use of a matured check, or other order for the payment of money, as a means of obtaining any signature, money or property, such as is specified in the last two sections, by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token within the meaning of those sections, although no representation is made in respect thereto.

As to the necessity of such a provision see Allen's case, 3 City H. Rec., 118; Conger's case, 4 Id., 65; 1 Wheel. Cr., 448; Van Pelt's case, 1 City H. Rec., 137; People v. Tompkins, 1 Park. Cr., 224.

Mock auc-  
tions.

§ 627. Every person who obtains any money or property from another, or obtains the signature of another to any written instrument, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in a state prison not exceeding three years, or in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment; and in addition thereto he forfeits any license he may hold to act as an auctioneer, and is forever disqualified from receiving a license to act a auctioneer within this state.

See Laws of 1853, ch. 138.

## CHAPTER VIII.

FRAUDULENTLY FITTING OUT AND DESTROYING  
VESSELS.

- SECTION 628. Captain, or other officer, willfully destroying vessel, &c.  
 629. Other persons willfully destroying vessel, &c.  
 630. Fitting out or lading any vessel, with intent to wreck the same.  
 631. Making false manifest, &c.

§ 628. Every captain or other officer or person in command or charge of any vessel, who within this state willfully wrecks, sinks, or otherwise injures or destroys such vessel, or any cargo in such vessel, or willfully permits the same to be wrecked, sunk, or otherwise injured or destroyed, with intent to prejudice or defraud an insurer or any other person, is punishable by imprisonment in a state prison for life.

Captain, or  
other offi-  
cer will-  
fully de-  
stroying  
vessel, &c.

Injuring or destroying vessels upon the high seas, is provided for by various acts of Congress. See the acts collected, Brightly's Dig., 209-211. The above section is therefore limited to acts committed within this state.

§ 629. Every person other than such as are embraced within the last section, who is guilty of any act therein prohibited, is punishable by imprisonment in a state prison not exceeding ten years and not less than three.

Other per-  
sons will-  
fully de-  
stroying  
vessel, &c.

§ 630. Every person guilty of fitting out any vessel, or of lading any cargo on board of any vessel, with intent to cause or permit the same to be wrecked, sunk or otherwise injured or destroyed, and thereby to prejudice or defraud an insurer or any other person, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three.

Fitting out,  
or lading  
any vessel  
with intent  
to wreck  
the same.

§ 631. Every person guilty of preparing, making or subscribing, any false or fraudulent manifest, invoice, bill of lading, ship's register or protest, with intent to defraud another, is punishable by imprison-

Making  
false man-  
ifest, &c.

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ment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

The offense of making false evidence to be used in legal trials or investigations, is covered by sections 165-170.

## CHAPTER IX.

## FRAUDULENT DESTRUCTION OF PROPERTY INSURED.

SECTION 632. Destroying property insured.

633. Presenting false proofs of loss in support of claim upon policy of insurance.

Destroying  
property  
insured.

§ 632. Every person who willfully burns, or in any other manner injures or destroys any property whatever which is at the time insured against loss or damage by fire, or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of such person or of any other, is punishable by imprisonment in the state prison not exceeding seven years, and not less than four.

Corresponds with the punishment for arson in the third degree, reported in section 539. See also note to sections 521 and 526.

Presenting  
false proofs  
of loss in  
support of  
claim upon  
policy of  
insurance.

§ 633. Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance, for the payment of any loss, or who prepares, makes or subscribes any account, certificate, survey, affidavit, proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in a state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or both.

## CHAPTER X.

## FALSE WEIGHTS AND MEASURES.

- SECTION 634. Using false weights or measures.  
 635. Selling provisions by false weight or measure.  
 636. Keeping false weights.  
 637. False weights and measures authorized to be seized.  
 638. May be tested by committing magistrate, and destroyed or delivered to district attorney.  
 639. Shall be destroyed after conviction of offender.  
 640. Stamping false weight or tare, on casks or packages.

§ 634. Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor.

*Using false weights or measures.*

See 2 Rev. Stat., 5, § 32.

§ 635. When the property sold by false weight or measure consists of any description of provisions, the offense is felony.

*Selling provisions by false weight or measure.*

By "provisions" are intended bread, meat, milk and other articles which form ordinary food.

§ 636. Every person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

*Keeping false weights.*

§ 637. Every person who is authorized or enjoined by law to arrest another person for a violation of sections 634, 635 and 636, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

*False weights and measures authorized to be seized*

§ 638. The magistrate to whom any weight or measure is delivered pursuant to the last section,

*May be tested by committing*

ting magistrate, and destroyed, or delivered to district attorney.

shall, upon the examination of the accused, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he shall cause it to be destroyed, or to be delivered to the district attorney of the county in which the accused is liable to indictment or trial, as the interests of justice in his judgment require.

Shall be destroyed after conviction of offender.

§ 639. Upon the conviction of the accused, such district attorney shall cause any weight or measure in respect whereof the accused stands convicted, and which remains in the possession or under the control of such district attorney, to be destroyed.

Stamping false weight or tare, on casks or packages.

§ 640. Every person who knowingly marks or stamps false or short weight, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

*Rep. Pol. Code, § 704.*

## CHAPTER XI.

### FRAUDULENT INSOLVENCIES BY INDIVIDUALS.

#### SECTION 641. Fraudulent conveyances.

642. Fraudulent removal of property to prevent levy.

643. Making assignments with preferences by insolvents, prohibited.

644. Frauds in procuring discharge in insolvency.

Fraudulent conveyances.

§ 641. Every person who, being a party to any conveyance or assignment of any real or personal property, or of any interest therein, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay or defraud creditors or other persons, and every person being privy to or knowing of such conveyance, assignment or charge, who willfully puts the same in use as having been made in good faith, is guilty of a misdemeanor.

*See 2 Rev. Stat., 690, § 3.*

§ 642. Every person who removes any of his property out of any county, with intent to prevent the same from being levied upon by any execution or attachment, or who secretes, assigns, conveys or otherwise disposes of any of his property, with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and every person who receives any such property with such intent, is guilty of a misdemeanor.

Fraudulent removal of property to prevent levy.

See 2 *Rer. Stat.*, 51, § 26.

§ 643. Every person who, knowing that his property is insufficient for the payment of all his lawful debts, assigns, transfers or delivers any property for the benefit of any creditor, or creditors, upon any trust or condition, that any creditor shall receive a preference or priority over any other, except in the cases in which such preference is expressly allowed to be given by law, or with intent to create such preference or priority, is guilty of a misdemeanor.

Making assignments with preferences by insolvents prohibited.

The adoption of the above section involves, of course, the abrogation of the right, so long recognized in this state, of making preferential assignments. At the time when the provisions of the Draft Civil Code, upon assignments for the benefit of creditors, were in course of compilation, the commissioners were not prepared to recommend so great a change in the existing law, without further deliberation and a fuller examination of the evils of the existing practice of assignments, than the time then at their command admitted. They, therefore, at that time presented a system of sections adapted to express the existing law of this state upon the subject, and suitable for enactment in case the legislature considered it best to adhere to the present system. They now, however, recommend that the right of a confessed insolvent debtor to make an assignment with preferences be abrogated, and that an order of priority in the payment of debts in cases of insolvency, suited as far as possible to the common sense of justice of the community, and independent of the choice of the individual debtor, be substituted.

The details of the system proper to be adopted for the distribution of an insolvent's property, if this recommendation should be approved, would be out of place in the Penal Code. The revision of the Civil Code will afford the proper opportunity for considering those details. In

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general, the rule of *pro rata* distribution, receives the common approval, on the principle that "equality is equity." The custom of merchants to recognize certain descriptions of debts, cash loans, trust funds, &c., as confidential debts entitled to a preference over those arising upon ordinary business transactions, ought not, however, to be overlooked. Debts resting in judgment may perhaps be properly preferred to open demands. Debts infected with usury, or otherwise invalid, may, with even greater propriety, be postponed to all other classes. The act of congress of 1799 (ch. 128, § 65), requires that a priority shall be given to the United States, in cases where an insolvent has made an assignment for the benefit of his creditors. Reserving these details for future consideration, it is only necessary here to suggest a penal provision for an attempt to create unlawful preferences in an assignment, and to call the attention of the legislature to the steady and remarkable progress of the jurisprudence of this state, in a direction tending always towards restriction of the privilege of preferential assignments within narrower and narrower bounds; and to the evidence to be derived from the whole course of our decisions and legislation upon the subject, that the privilege itself, as usually exercised, creates opportunities for fraud and temptations to litigation which form a sufficient reason why it should be abrogated.

The earlier adjudications of our courts abound in recognitions of the right of a debtor, although insolvent, to prefer lawful debts at discretion. *Jackson v. Brownell*, 3 *Cai.*, 222; *McMenomy v. Ferrers*, 3 *Johns.*, 71; *Wilkes v. Ferris*, 5 *Id.*, 335; *Hyslop v. Clarke*, 14 *Id.*, 458; *Murray v. Riggs*, 15 *Id.*, 571; *Hendricks v. Robinson*, 2 *Johns. Ch.*, 283, aff'd, 17 *Johns.*, 438; *McMenomy v. Roosevelt*, 3 *Johns. Ch.*, 446; *Nicoll v. Mumford*, 4 *Id.*, 522; *Williams v. Brown*, 4 *Id.*, 682; *Wilder v. Winne*, 6 *Cow.*, 284; *Wintringham v. La Foy*, 7 *Id.*, 735; *Jackson v. Cornell*, 1 *Sand. Ch.*, 438; *Cunningham v. Freeborn*, 11 *Wend.*, 241.

The later periods of our legal history abound in decisions pointing out and endeavoring to remedy frauds to which this privilege has given rise. The following is a brief review of the leading restrictions which have been imposed:

1. Moneyed corporations and limited partnerships have been prohibited by statute from making assignments with preferences. 1 *Rev. Stat.*, 591, § 9; *Id.*, 766, §§ 20, 21. This prohibition is held to apply to associations organized under the general banking law, and to forbid even an assignment to a single creditor in payment of his particular demand. *Robinson v. Bank of Attica*, 21 *N.Y.* 406. Whether corporations are left at liberty to n

assignments *without* preference, is disputed. See *De Ruyter v. St. Peter's Church*, 3 *N. Y.*, 238; *Hurlbert v. Carter*, 21 *Barb.*, 221; *Bowery Bank case*, 5 *Abb. Pr.*, 415; *Loring v. U. S. Vulcanized Gutta Percha & B. Co.*, 36 *Barb.*, 329, though the better opinion, probably, is that they are. An infant is incompetent to assign; because an assignment must be absolute, while an infant's act is defeasible on becoming of age. *Fox v. Heath*, 21 *How. Pr.*, 384.

2. Under the former bankrupt laws an assignment with preferences was held to be a fraud upon creditors, if made in contemplation of proceedings for a discharge in bankruptcy. *Ogden v. Jackson*, 1 *Johns.*, 370; *Phoenix v. Ingraham*, 5 *Id.*, 412; *Hastings v. Belknap*, 1 *Den.*, 190; *Freeman v. Denning*, 3 *Sandf. Ch.*, 327. A similar rule has obtained with respect to assignments—although without preferences—made pending proceedings to compel the debtor to make an assignment, instituted under the non-imprisonment act of 1831. *Spear v. Wardell*, 1 *Const.*, 144; *Hall v. Kellogg*, 2 *Kern*, 325; *Wood v. Boland*, 8 *Paige*, 556. And one who has made an assignment with preferences is debarred from a discharge under the insolvent act. 2 *Rev. Stat.*, 20, § 24.

3. After some dispute it has been settled that a general assignee for the benefit of creditors stands in no better position, and has no higher rights in respect to enforcing choses in action transferred by the assignment, than those of his assignor. He is not to be regarded as a purchaser for a valuable consideration. *Matter of Howe*, 1 *Paige*, 125; *Mead v. Phillips*, 1 *Sandf. Ch.*, 83; *Marine and Fire Ins. Bank of Georgia v. Jauncey*, 1 *Barb.*, 486; *Leger v. Bonaffe*, 2 *Barb.*, 475; *Warren v. Fenn*, 28 *Id.*, 333; *Van Heusen v. Radcliff*, 17 *Id.*, 580; *Bliss v. Cottle*, 32 *Barb.*, 322; *Reed v. Sands*, 37 *Id.*, 185; *Maas v. Goodman*, 2 *Hill*, 275; *Schieffelin v. Hawkins*, 14 *Abbott's Pr.*, 112. Thus he takes evidences of debt subject to any offset which existed against his assignor (*Chance v. Isaacs*, 5 *Paige*, 592; *Maas v. Goodman*, 2 *Hill*, 275) and merchandise subject to any right of stoppage in transit (*Harris v. Hunt*, 6 *Duer*, 606; *Harris v. Pratt*, 17 *N. Y.*, 249), or to any vendor's lien (*Haggerty v. Palmer*, 6 *Johns. Ch.*, 437), which might have been enforced against his assignor. And he cannot impeach previous transfers of property made by his assignor which were binding upon the latter, although they may be voidable for fraud at the instance of creditors. *Van Heusen v. Radcliff*, 17 *N. Y.*, 580; *Brownell v. Curtis*, 10 *Paige*, 210; *Storm v. Davenport*, 1 *Sandf. Ch.*, 135; *Osborne v. Moss*, 7 *Johns.*, 161; *Averill v. Loucks*, 6 *Barb.*, 470; *Mills v. Argall*, 6 *Paige*, 577, with which compare *Bayard v. Hoffman*, 4 *Johns. Ch.*, 450.

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4. Any clauses in an assignment which confer any power or privilege upon the assignee inconsistent with the simple duty of converting the assets promptly into cash, and distributing it among the creditors, or which give him a compensation or advantage therein not allowed by law, operate to defraud creditors, and are therefore held to render the assignment void. Upon this ground assignments have been condemned in several cases;—for instance, for giving the assignee power to name his successor (*Planch v. Schermerhorn*, 3 *Barb. Ch.*, 644); for giving him an extended time within which to perform his duty of sale and payment (*Woodburne v. Mosher*, 9 *Barb.*, 255; *D'Ivernois v. Leavitt*, 23 *Barb.*, 63; compare *Bellows v. Partridge*, 19 *Barb.*, 176); for providing in effect that he should not be personally liable for losses resulting from a mere want of ordinary diligence (*Litchfield v. White*, 3 *Seld.*, 438; *Olmstead v. Herrick*, 1 *E. D. Smith*, 310; with which compare *Van Nest v. Yoe*, 1 *Sandf. Ch.*, 4; *Jacobs v. Allen*, 18 *Barb.*, 549); for providing a compensation beyond that allowed by law (*Nichols v. McEwen*, 17 *N. Y.*, 22); and for enabling him to vary the order of preferences. *Barnum v. Hempstead*, 7 *Paige*, 568; *Boardman v. Halliday*, 10 *Id.*, 223; *Strong v. Skinner*, 4 *Barb.*, 546.

But clauses which merely express in terms, powers or rights which the law would confer upon the assignee, were they not expressed;—such as a provision that he may employ agents (*Mann v. Whitbeck*, 17 *Barb.*, 388; *Van Dine v. Willett*, 24 *How. Pr.*, 206); that he may advertise for demands, and pay those presented within a certain time (*Ward v. Tingley*, 4 *Sandf. Ch.*, 476); that he may pay insurance premiums, and mortgage interest upon the property (*Whitney v. Krows*, 11 *Barb.*, 198); or rent and taxes (*Van Dine v. Willett*, 24 *How. Pr.*, 206, and 38 *Barb.*, 319); or a provision for his compensation which allows of its being adjusted at a sum within his legal commissions (*Keteltas v. Wilson*, 36 *Barb.*, 298; 23 *How. Pr.*, 69; *Halstead v. Gordon*, 34 *Barb.*, 422; *Campbell v. Woodworth*, 33 *Barb.*, 425; 24 *N. Y.*, 304); or directions as to sale or distribution which leave him at liberty to comply with the requirements of the law (*Wilson v. Robertson*, 21 *N. Y.*, 589; 19 *How. Pr.*, 350; *Ogden v. Peters*, *Id.*, 23; *Griffin v. Marquadt*, *Id.*, 221; *Jessup v. Hulse*, *Id.*, 168; *Stern v. Fisher*, 32 *Barb.*, 198; *Halstead v. Gordon*, 34 *Barb.*, 422);—are unobjectionable. See also, *Brigham v. Tillinghast*, 15 *Barb.*, 618; *Dow v. Platner*, 16 *N. Y.*, 562; *Bellows v. Partridge*, 19 *Barb.*, 176.

5. Ingenuity has been frequently exerted to prepare assignments in such a form as should secure some ultimate surplus, or other benefit or advantage, to the assignor. Assignments upon any trust which operates in this man-

ner have been, from an early period, declared void by statute. 1 *Rev. Stat.*, 135, § 1. The application of this statute has been often invoked to defeat endeavors of insolvents to place property out of the reach of their creditors, with a view to their own ultimate benefit. The case of *Goodrich v. Downs* (6 *Hill*, 438,) was upon this subject. The assignment drawn in question in that case directed the assignees to pay certain specified creditors, making no provision for others, and to pay the surplus, if any, to the assignor. It was held that such an assignment was void upon its face; as operating to put a part of the debtor's property out of the reach of creditors for his own benefit; and that as the statute declares that in such a case the *conveyance* shall be void, the void trust as to the surplus avoided the whole deed. And it could not be aided by extrinsic proof that there would be no surplus. The parties having expressly provided for a surplus, were not at liberty to say they did not contemplate one. To the same effect is *Strong v. Skinner*, 4 *Barb.*, 456. See, however, a disapproval of the grounds of decision in *Goodrich v. Downs*, in *Curtis v. Leavitt*, 15 *N. Y.*, 9, 114.

In *Goodrich v. Downs* the property assigned was *personal*; in *Barney v. Griffin*, decided in the court of appeals in 1849 (2 *Comst.*, 365), similar principles were established with reference to assignments of *real* property. It was there determined that an assignment of a debtor's entire property, in trust to pay certain specified creditors, and, without making any provision for others, to repay the residue to the assignor, is void, for fraud upon creditors not provided for; inasmuch as the property is placed beyond the reach of their executions, in the hands of men not accountable to them, and upon a trust in part for the benefit of the debtor. And the defect cannot be aided by proof there will be no surplus. Substantially the same view is taken in *Leitch v. Hollister* (4 *Comst.*, 211), *Lansing v. Woodruff* (1 *Sandf.* ch. 43), and *Clark v. Dowlings* (1 *Hill & D. Supp.*, 105); and the rule has even been applied in a case where it was thought that the resulting trust was not intended, but arose from an inadvertent omission in drawing the assignment *Hooper v. Tuckerman* (3 *Sandf.*, 311); and in cases where the assignment was of partnership property, and the resulting trust arose only indirectly through the individual interest of partners in the residue of the firm assets. (*Johnson v. Gardner*, 4 *N. Y. Leg. Obs.*, 424; *Collomb v. Caldwell*, 16 *N. Y.*, 484; *Wilson v. Robertson*, 21 *N. Y.*, 387; 19 *How. Pr.*, 350; *Smith v. Howard*, 20 *How. Pr.*, 121); with which compare *Collumb v. Read* (24 *N. Y.*, 405); compare, however, upon this subject, *Wilkes v. Tenis* (5 *Johns.*, 335), and remarks upon *Barney v. Griffin* (cited *supra*), in *Curtis v. Leavitt* (15 *N. Y.*, 118, 176).

Some cases, indeed, are recognized as not within the rule avoiding an assignment for expressing a trust to pay a surplus to the assignor. One class is, cases in which property is assigned direct to a particular creditor, as a means of securing payment of his demand. Such an assignment being in the nature of a mortgage for the particular demand, a trust to pay the surplus to the assignor, is held to result from the nature of the instrument; and whether it is stated in the instrument or left to implication, is immaterial. (*Leitch v. Hollister*, 4 *Comst.*, 24; *Hendricks v. Robinson*, 3 *Johns. Ch.*, 284, affirmed 17 *Johns.*, 438; *Dunham v. Whitehead*, 21 *N. Y.*, 131; *McLellan v. Remsen*, 36 *Barb.*, 622; 14 *Abbott's Pr.*, 381; 23 *How. Pr.*, 175.)

Another class embraces cases in which the surplus directed to be returned is only such as may remain after paying *all* creditors in full. Where a surplus results under such circumstances, the law implies a trust to repay it to the assignor. Hence a direction to repay a surplus in an assignment will not avoid it, if the instrument in effect empowers the assignor first to pay all creditors in full, in case assets are sufficient. (*Wintingham v. Lafroy*, 7 *Cow.*, 735; *Van Rossum v. Walker*, 11 *Barb.*, 237; *Ely v. Cook*, 18 *Id.*, 612; *Taylor v. Stevens*, 7 *How. Pr.*, 415.)

A third class comprises cases in which particular items of property are excepted from the assignment. As these remain open to the reach of creditors in the same manner as they were before the assignment was made, the reservation does not operate to delay them. (*Carpenter v. Underwood*, 19 *N. Y.*, 520.)

A reservation of a specific sum to the assignor for the support of his family, was thought, in an early case, to constitute no objection to the instrument, as to the residue. (*Murray v. Riggs*, 15 *Johns.*, 535.) Later, it has been held to render the whole assignment void, as operating to put property of the assignor out of the reach of his creditors, and for his own enjoyment. (*Mackie v. Cairns*, 5 *Cow.*, 547.) The same principle has been held applicable where an assignment provided for payment of a sum which the assignor had applied for as a loan, and had reason to believe was upon the way to him, but which he had not yet received. As such sum would not belong to the assigned assets, but must be repaid from them, the effect was an indirect reservation of the sum, from the estate, for the individual benefit of the assignor. (*Sheldon v. Dodge*, 4 *Den.*, 217; see, also, to nearly the same effect, *Barnum v. Hempstead*, 7 *Paige*, 568.)

6. Provisions have often been inserted in assignments tending to enable the debtor to exercise a future preference between his creditors. These are held to avoid the instrument. Examples are, where the assignment pro-

ferred the creditors who should be named in a schedule to be thereafter made out and affixed (*Averill v. Loucks*, 6 *Barb.*, 470); where it directed that, in a certain contingency, debts enumerated in a later class should be preferred to those mentioned in an earlier one (*Sheldon v. Dodge*, 4 *Den.*, 217); and where it directed that if certain creditors should refuse to release the assignor then such creditors should be preferred to them as the assignors should appoint. (*Hyslop v. Clarke*, 14 *Johns.*, 458.)

7. The endeavor to empower an assignee to impose conditions upon creditors, before paying their demands, has frequently been held ground for avoiding the assignment; as where certain creditors are directed to be preferred upon the condition that they execute releases of their demands (*Hyslop v. Clarke*, 14 *Johns.*, 458; *Austin v. Bell*, 20 *Id.*, 442; *Grover v. Wakeman*, 11 *Wend.*, 187; *Armstrong v. Byrne*, 1 *Edw.*, 79; *Lentilhon v. Moffat*, 1 *Edw. Ch.*, 451; *Searing v. Brincherhoff*, 5 *Johns. Ch.*, 329; *Hone v. Henriquez*, 13 *Wend.*, 240; *Gasherie v. Apple*, 14 *Abbott's Pr.*, 64); or where the assignment authorizes a surplus to be divided among those who will execute a release. (*Grover v. Wakeman*, 11 *Wend.*, 187; *Mills v. Levy*, 2 *Edw.*, 183; but see *De Caters v. De Chaumont*, 2 *Paige*, 490; *Hastings v. Belknap*, 1 *Den.*, 190. See also, upon the same general principle, *Berry v. Riley*, 2 *Barb.*, 307; *Bellows v. Partridge*, 19 *Barb.*, 176; *Oliver Lee & Co's. Bank v. Talcott*, 19 *N. Y.*, 146; *Bank of Silver Creek v. Talcott*, 22 *Barb.*, 550; *Jewett v. Woodward*, 1 *Edw.*, 195; *Van Nest v. Yoe*, 1 *Sandf. Ch.*, 4; *Spaulding v. Strong*, 36 *Barb.*, 310.)

8. Directions to an assignee to deal with the estate in a given way, in order to increase the amount to be realized from it, are another class of frauds upon creditors; that is, they are held to be fraudulent and to avoid the assignment wherever they operate to *delay* a sale. At one period their tendency was not fully perceived. Therefore, where in an assignment made by proprietors of a foundry, the trustee was directed to conduct and carry on the establishment for the benefit of the creditors, to sell the manufactured articles, to work up and sell those unmanufactured, and, in general, to sell all the property as soon as it could conveniently be done without a sacrifice, it was held that these directions were not necessarily fraudulent. But this view has been disapproved by the later cases; which go upon the general ground that the creditors have a right to a prompt sale and distribution of proceeds, whether a sacrifice is the result or not. Without their consent the debtor cannot carry on his business through the medium of an assignee, for the purpose of increasing the ultimate fund. He may direct, in general terms, a sale of the property, and to what debts and in what order the proceeds shall be

applied; but beyond this he can prescribe no condition whatever as to the management or disposal of the estate. (Dunham *v.* Waterman, 17 N.Y., 9. To the same effect are Van Nest *v.* Yoe, 1 *Sandf. Ch.*, 4; 2 N.Y. *Leg. Obs.*, 70; Schlussel *v.* Willett, 34 *Barb.*, 615; 12 *Abb. Pr.*, 397; 22 *How. Pr.*, 15.)

9. Akin to the last mentioned provisions are clauses which empower the assignee to sell upon credit, with a view thereby to realize a larger price for the assets. As this necessarily protracts the ultimate distribution until the term of credit expires, such a sale is held a fraud upon the right of the creditors to have the assets converted into money, and the money divided without delay. (Rogers *v.* De Forest, 7 *Paige*, 272; Barney *v.* Griffin, 2 *Comst.*, 365; 8 N.Y. *Leg. Obs.*, 68; and 9 *Id.*, 106; Nicholson *v.* Leavitt, 2 *Seld.*, 510; and 6 *Id.*, 591; Burdick *v.* Post, 2 *Id.*, 522; Houghton *v.* Westervelt, *Seld. notes*, No. 1, 32; Porter *v.* Williams, 5 *Seld.*, 142; and 12 *How. Pr.*, 107; Lyons *v.* Platner, 11 N.Y. *Leg. Obs.*, 87.) As in the case of clauses conferring other powers on the assignee, so in respect to the terms in which the power to sell is expressed, if they do not necessarily import discretionary power to sell upon credit, inconsistent with the legal duty of his trust, but may be construed as consistent with an immediate conversion into money, the assignment is not rendered invalid. (Kellogg *v.* Slauson, 1 *Kern.*, 302; Whitney *v.* Krows, 11 *Barb.*, 198; Southworth *v.* Sheldon, 7 *How. Pr.*, 414; Bellows *v.* Partridge, 19 *Barb.*, 176; 12 N.Y. *Leg. Obs.*, 219; Clark *v.* Fuller, 21 *Barb.*, 128; Nichols *v.* McEwen, *Id.*, 65; Wilson *v.* Ferguson, 10 *How. Pr.*, 176; Clapp *v.* Utley, 16 *Id.*, 384; Meacham *v.* Stearns, 9 *Paige*, 398; Wilson *v.* Robertson, 21 N.Y., 589; 19 *How. Pr.*, 350; Ogden *v.* Peters, *Id.*, 23; Griffin *v.* Marquadt, *Id.*, 121; Schufeldt *v.* Abernethy, 2 *Duer*, 533; 12 N.Y. *Leg. Obs.*, 173; Murphy *v.* Bell, 8 *How. Pr.*, 468.) And a clause forbidding the assignee to sell upon credit, though superfluous, does not affect the assignment. (Carpenter *v.* Underwood, 19 N.Y., 520; Van Rossum *v.* Walker, 11 *Barb.*, 237; Stern *v.* Fisher, 32 *Barb.*, 198.)

10. In addition to the protection thrown around the rights of creditors by the principles embodied in the adjudications abovementioned, it was found necessary, in 1860, for the legislature to interpose in their behalf; and to enact that assignments shall be in writing and acknowledged and recorded; that the assignor shall deliver to the county judge a sworn schedule containing an account of the creditors, stating their residences, the sums due them respectively, the consideration of each debt, and any collateral security held for it, and containing also an inventory of all the debtor's estate, stating incumbrances upon it, vouchers and securities appertaining to

it and its value; that the assignee must file a bond with sureties for the faithful performance of his duty, and that an accounting may be compelled, in due season, by legal proceedings for that purpose. (*Laws of 1860*, ch. 348.) This act has been deemed directory merely (*Evans v. Chapin*, 12 *Abbott's Pr.*, 161; 20 *How. Pr.*, 289; *Fairchild v. Gwynne*, 14 *Abbott's Pr.*, 121), at least in so far as it requires an inventory and bond (*Juliand v. Rathbone*, 39 *Barb.*, 97); but it appears to be the better opinion that a compliance by the assignor with the prerequisites imposed by the statute to be performed upon his part is essential to the validity of the instrument. (*Fairchild v. Gwynne*, 16 *Abbott's Pr.*, 23, rev'd s. c., *supra*; *Cook v. Kelley*, 14 *Id.*, 466.)

This brief review of the leading authorities in our state upon the restrictions imposed upon the right of preferential assignments, indicates what is much more clear upon a careful perusal of the decisions and statutes, viz.: that the strong tendency of the rule recognizing a discretionary power in debtors to give preferences, is towards fraud, and that the whole course of our jurisprudence and legislation has been steadily to restrict this power within narrower limits, and give creditors new means of protection.

The system of restrictions which has thus grown up may be briefly stated thus: A debtor, if not a moneyed corporation, nor a member of a limited partnership, nor an infant, nor a person contemplating proceedings for an insolvent's discharge, may make an assignment indicating preferences among his creditors, if the demands preferred are actual, valid, and honest;—provided that he confers no right or privilege upon his assignee inconsistent with the simple duty to sell and divide, nor any compensation exceeding that awarded by law; that he withholds nothing directly or indirectly, intentionally or inadvertently, immediately, or remotely, for himself; that he denotes the preferences to be made absolutely and finally, neither reserving to himself, nor giving his assignee a power to modify them, nor making them dependent upon contingencies; that he abstains from any attempt to exact or empower his assignee to exact favor from his creditors, as a condition of the payment of their dividends; that he authorizes an immediate conversion of the property into cash, neither permitting the sale to be deferred to allow the assets to be nursed into greater value, nor credit to be given in hope of obtaining a higher price; and lastly (which provision opens a wide field of litigation not touched by the decisions above reviewed), that there are not in all the attendant circumstances under which the act is done, indications of an actual intent to hinder, delay or defraud his creditors;—the privilege being moreover allowed to be exercised only by means of an instrument in writing,

acknowledged and recorded, and accompanied by a full disclosure of both the debit and credit sides of the assignor's affairs,— and even then only upon the condition that the assignee shall give bonds for the discharge of his duty, and stand liable to render account of his proceedings to a legal tribunal. Stated in the books, viewed as a theory, the privilege seems reasonable, and the guards against abuse sufficient. But as actually administered, a system better adapted to tempt the designing and corrupt, to fraud, and to provoke litigation against the well disposed and the honest, could not easily be devised.

The Commissioners are of opinion that the policy of permitting insolvents to regulate the distribution of their estates among their creditors should be abandoned, and that the order of preference should be prescribed by law, upon general considerations of justice and sound policy, instead of being left to be determined by the irresponsible and often capricious or prejudiced judgment, or fraudulent purposes of the insolvent, or influenced by the undue solicitation of particular creditors.

The effect of the provision in the text, unless modified by such provisions as have been above suggested, would be that the property of an insolvent would become a trust fund to be administered in equity for the equal benefit of all his (if needed) creditors, as in the case of insolvent limited partnerships. (*Inness v. Lansing, 7 Paige, 583.*)

Frauds in  
procuring  
discharge  
in insol-  
vency.

**§ 644. Every person who, upon making or prosecuting any application for a discharge as an insolvent debtor, either:**

1. Fraudulently presents, or authorizes to be presented on his behalf, such application, in a case in which it is not authorized by law; or,
2. Makes or presents to any court or officer, in support of such application, any petition, schedule, book, account, voucher, or other paper or document, knowing the same to contain any false statement; or,
3. Fraudulently makes and exhibits, or alters, obliterates or destroys any account or voucher relating to the condition of his affairs, or any entry or statement in such account or voucher; or,
4. Practices any fraud upon any creditor, with intent to induce him to petition for, or consent to such discharge; or,
5. Conspires with or induces any person fraudu-

lently to unite as creditor in any petition for such discharge, or to practice any fraud in aid thereof,

Is guilty of a misdemeanor.

## CHAPTER XII.

### FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS IN THEIR MANAGEMENT.

- SECTION**
- 645. Frauds in subscriptions for stock of corporations.
  - 646. Frauds in procuring organization of corporation, or increase of capital.
  - 647. Unauthorized use of names in prospectuses, &c.
  - 648. Misconduct of directors of stock corporations.
  - 649. Misconduct of directors of banking corporations.
  - 650. Loans made in violation of last section, not invalid.
  - 651. Sale or hypothecation of bank notes by officer, &c.
  - 652. Officer of bank putting excessive number of its notes in circulation.
  - 653. Officer or agent of banking corporation, making guarantee or indorsement, in its behalf, in certain cases.
  - 654. Bank officer overdrawing his account.
  - 655. Omitting to enter receipt of property of corporation in its books.
  - 656. Destroying or falsifying books or papers of corporation.
  - 657. Officer of corporation publishing false reports of its condition.
  - 658. Officer of corporation refusing to permit an inspection of its books.
  - 659. Insolvencies of corporations deemed fraudulent, when.
  - 660. Directors participating in fraudulent insolvency, how punishable.
  - 661. Violation of duty of directors of moneyed corporations.
  - 662. Officer of railroad company contracting debt in its behalf, exceeding its available means.
  - 663. Debt contracted in violation of last section, not invalid.
  - 664. Director of corporation presumed to have knowledge of its affairs.
  - 665. Director present at meeting, when presumed to have assented to proceedings.
  - 666. Director absent from meeting, when presumed to have assented to proceedings.
  - 667. Foreign corporations.
  - 668. "Director" defined.

**§ 645.** Every person who signs the name of a fictitious person to any subscription for, or agreement to take stock in any corporation, existing or proposed; and every person who signs, to any subscription or

Frauds in  
subscriptions for  
stock of  
corporations.

agreement, the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

This section, which is new, is intended to reach a species of fraud frequently practised in the organization of corporations. See *Palmer v. Lawrence*, 3 *Sands.*, 161; 1 *Seld.*, 389.

Frauds in  
procuring  
organiza-  
tion of cor-  
poration,  
or increase  
its capital.

**§ 646.** Every officer, agent or clerk, of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years and not less than three.

See *Laws of 1829*, ch. 94, § 29.

Unauthor-  
ized use of  
names in  
prospec-  
tuses, &c.

**§ 647.** Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint stock association existing or intended to be formed, with intent to permit the same to be published and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.

Miscon-  
duct of  
directors  
of stock  
corpora-  
tions.

**§ 648.** Every director of any stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either:

1. To make any dividend, except from the surplus

profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of any installment actually called in, and required to be paid, or with the intent of providing the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with the intent of enabling any stockholder to withdraw any part of the money paid in by him, or his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; or,

6. To receive any such shares in payment or satisfaction of any debt due to such corporation; or,

7. To receive from any other stock corporation, in exchange for the shares, notes, bonds, or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds or other evidences of debt issued by such other corporation,

Is guilty of a misdemeanor.

§ 649. Every director of any corporation having banking powers, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either:

Misconduct of  
directors  
of banking  
corporations.

1. To make any loan, or discount, by which the whole amount of the loans and discounts of the corporation is made to exceed three times its capital stock then paid in and actually possessed; or,

2. To make any loan or discount to any director of such corporation, or upon paper upon which any such director is responsible, to an amount exceeding

in the aggregate one-third of the capital stock of such corporation, then paid in and actually possessed,

Is guilty of a misdemeanor.

The provisions of this and the preceding section are founded on 1 *Rev. Stat.*, 589, § 1. That section embodies nine subdivisions, the first seven of which correspond with those of section 648 in the text, while the eighth and ninth correspond with those of section 649. The whole section is, however, as it appears in the Revised Statutes, limited to *moneyed* corporations; while the last two subdivisions are restricted to corporations having banking powers. In the opinion of the commissioners, the provisions of the first seven subdivisions should be extended to all *stock* corporations; and they have so framed them; placing in a separate section, confined to banking corporations, the provisions of subdivisions 8 and 9.

The word "corporation" is substituted for "company," in one or two instances, merely for the sake of greater uniformity of expression.

Loans made  
in violation  
of last sec-  
tion, not  
invalid.

§ 650. Nothing in the last section shall render any loan made by the directors of any such corporation, in violation thereof, invalid.

See 2 *Rev. Stat.*, 590, § 1, *subd.* 9.

Sale, or  
hypotheca-  
tion of bank  
notes, by  
officer, &c.

§ 651. Every officer or agent of any corporation having banking powers, who sells, or causes or permits to be sold, any bank notes of such corporation, or pledges or hypothecates, or causes or permits to be pledged or hypothecated, with any other corporation, association or individual, any such notes, as a security for a loan or for any liability of such corporation, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

See *Laws of 1842 ch. 247, § 10.*

Officer of  
bank put-  
ting exces-  
sive num-  
ber of its  
notes in  
circulation.

§ 652. Every officer or agent of any corporation having banking powers, who issues or puts in circulation, or causes or permits to be issued or put in circulation, the bank notes of such corporation to an amount, which, together with previous issues, leaves in circulation or outstanding a greater amount of notes

than such corporation is allowed by law to issue and circulate, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both.

See *Laws of 1842*, ch. 247, § 11.

**§ 653.** Every officer or agent of any banking corporation, who makes or delivers any guarantee or indorsement upon behalf of such corporation, whereby it may become liable upon any of its discounted notes, bills or obligations, in any sum beyond the amount of loans and discounts which such corporation may legally make, is guilty of a misdemeanor.

Officer or  
agent of  
banking  
corpora-  
tion, mak-  
ing guar-  
anteed or  
indorse-  
ment, in  
its behalf,  
in certain  
cases.

See *Laws of 1841*, ch. 292, § 2. The commissioners have substituted the words "in any sum beyond the amount of loans and discounts which such corporation may legally make"—in place of the words "beyond the sum which, added to its other loans and discounts, shall exceed the amount of loans and discounts which such corporation may legally make," which are equivocal.

**§ 654.** Every officer, agent, teller, clerk or servant of any bank, banking association or savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor.

Bank offi-  
cer over-  
drawing  
his account.

See *Nixon's Dig.*, *L. of N. J.*, 372, § 4; *State v. Stimson*, 4 *Zabr.*, 478.

**§ 655.** Every director, officer or agent of any corporation or joint stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of such corporation or association, is guilty of a misdemeanor.

Omitting to  
enter re-  
ceipt of  
property of  
corpora-  
tion in its  
books.

**§ 656.** Every director, officer, agent or member of any corporation or joint stock association, who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities

Destroying  
or falsify-  
ing books  
or papers of  
corpora-  
tion.

belonging to such corporation or association, or makes or concurs in making any false entry, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

This provision is broader than that of *Laws of 1829*, ch. 94, § 29, which is confined to moneyed corporations.

In view of this extension the section has been so framed as to allow a lighter punishment, in suitable cases, than is prescribed by that act.

Officer of corporation publishing false reports of its condition.

**§ 657.** Every director, officer or agent of any corporation or joint stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are mentioned in sections 646 and 647, is guilty of a misdemeanor.

See *Cross v. Sackett*, 6 *Abbott's Pr. R.*, 247, and numerous cases there cited; also, *Harper v. Chamberlain*, 11 *Abbott's Pr.*, 234.

Officer of corporation refusing to permit an inspection of its books

**§ 658.** Every officer or agent of any corporation having or keeping an office within this state, who has in his custody or control any book, paper or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

See *Laws of 1825*, ch. 325, § 1; *Cotheal v. Brouwer*, 1 *Seld.*, 562.

Insolvencies of corporations deemed fraudulent, when.

**§ 659.** Every insolvency of a moneyed corporation is deemed fraudulent unless its affairs appear, upon investigation, to have been administered fairly and legally, and generally with the same care and dili-

gence that agents receiving a compensation for their services are bound by law to observe.

*2 Rev. Stat., 592, § 14.*

§ 660. In every case of a fraudulent insolvency of a moneyed corporation, every director thereof who participated in such fraud, if no other punishment is prescribed therefor by this Code, or any of the acts which are specified as continuing in force, is guilty of a misdemeanor.

Directors participating in fraudulent insolvency, how punishable.

§ 661. Every director of any moneyed corporation, who willfully does any act, as such director, which is expressly forbidden by law, or willfully omits to perform any duty expressly imposed upon him as such director, by law, the punishment for which act or omission is not otherwise prescribed by this Code, or by some of the acts which it specifies as continuing in force, is guilty of a misdemeanor.

Violation of duty of directors of moneyed corporations.

§ 662. Every officer, agent or stockholder of any railroad company who knowingly assents to or has any agency in contracting any debt, by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it, at the time such debt is contracted, including its bona fide and available stock subscriptions, and exclusive of its real estate, is guilty of a misdemeanor.

Officer of railroad company contracting debt in its behalf, exceeding its available means.

Founded on *Laws of 1845*, ch. 230; the language of that act being modified with a view to attain greater clearness.

§ 663. The last section does not affect the validity of a debt created in violation of its provisions, as against the company.

Debt contracted in violation of last section not invalid.

*Laws of 1845, ch. 230.*

§ 664. Every director of a corporation, or joint stock association, is deemed to possess such a know-

Director of corporation pre-

~~sumed to have known ledge of its affairs.~~

ledge of the affairs of his corporation, as to enable him to determine whether any act, proceeding or omission of its directors, is a violation of this chapter.

See 2 Rev. Stat., 592, § 12.

~~Director present at meeting, when presumed to have assented to proceedings.~~

§ 665. Every director of a corporation, or joint stock association, who is present at a meeting of the directors at which any act, proceeding or omission of such directors, in violation of this chapter occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

See 2 Rev. Stat., 592, § 12.

~~Director absent from meeting, when presumed to have assented to proceedings.~~

§ 666. Every director of a corporation, or joint stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter, occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not, within that time, cause, or in writing require his dissent from such illegality to be entered in the minutes of the directors.

See 2 Rev. Stat., 592, § 13.

~~Foreign corporations.~~

§ 667. It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, government or country, if it was one carrying on business, or keeping an office therefor, within this state.

~~"Director" defined.~~

§ 668. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or known by law.

See 2 Rev. Stat., 599, § 53.

## CHAPTER XIII.

## FRAUDS IN THE SALE OF PASSAGE TICKETS.

- SECTION 669.** Sale of passage tickets on vessels and railroads, forbidden, except by agents specially authorized.  
**670.** Sales by authorized agents, restricted.  
**671.** Unauthorized persons forbidden to sell certificates, receipts, &c., for the purpose of procuring tickets.  
**672.** Punishment for violation of the preceding sections.  
**673.** Conspiring to sell passage tickets in violation of law.  
**674.** Conspirators may be indicted, notwithstanding object of conspiracy has been accomplished.  
**675.** Offices kept for unlawful sale of passage tickets, declared disorderly houses.  
**676.** Pursers, station masters, conductors, &c., allowed to sell tickets.  
**677.** Delay in departure of vessels.  
**678.** What must be stated in passage ticket.  
**679.** Sale of tickets not filled out as required in last section, a felony.  
**680.** Requisites of indictment.  
**681.** "Company" defined.  
**682.** Foreign Railroad Companies.

**§ 669.** No person except the persons designated in section 676 shall issue or sell or offer to sell, within this state, any passage ticket, or any instrument giving or purporting to give any right, either absolutely or upon any condition or contingency, to any passage or conveyance upon any vessel or railroad train, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of this chapter, unless he has been by them duly appointed by an authority in writing, and which designates the name of the company, line, vessel or railroad for which such person is authorized to act as agent, together with the street and number of the street, and the city,

Sale of  
passage  
tickets on  
vessels  
and rail-  
roads for-  
bidden,  
except by  
agents spe-  
cially an-  
thorized.

town or village in which his office shall be kept, for the sale of passage tickets.

Founded upon *Laws of 1860*, ch. 103, § 1. The provisions of this chapter are substantially a re-enactment of the act of 1860, with such modifications of language as are deemed suitable to incorporate the sections of the act of 1860, with those of the Penal Code. The provisions are extended to railroad tickets, the sale of which offers opportunities for frauds, corresponding with those in the sale of tickets on vessels. The regulations comprised in the act are new in our law; and the subject has been recently and fully treated by the legislature. The Commissioners have, therefore, not thought it necessary to propose any other substantial changes.

Sales by  
authorized  
agents, re-  
stricted.

§ 670. No person except the persons designated in section 676 shall, within this state, ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railroad train, or for the procurement of any ticket or instrument giving or purporting to give any right, either absolutely or upon any condition or contingency, to any passage or conveyance upon any vessel or railroad train, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell any such ticket or instrument, or ask, take or receive any consideration for any such passage or conveyance, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the preceding section, nor for a sum exceeding the price charged at the time of such sale, by the company, owners or consignees of the vessel or railroad referred to in such ticket. Nor shall any such ticket or instrument be issued or sold, which purports to entitle a person to a passage by any mode of conveyance, or to any place of destination, or by any route, vessel or train, other than the one bargained for.

Founded upon *Laws of 1860*, ch. 103, § 2.

Unauthor-  
ized per-  
sons forbid-  
den to sell  
certificates,  
receipts,

§ 671. No person other than an agent appointed, as provided in section 669, shall sell, or offer to sell, or in any way attempt to dispose of any order, cer-

tificate, receipt or other instrument for the purpose, or under the pretense of procuring any ticket, or instrument mentioned in section 669, upon any company or line, vessel or railroad train therein mentioned. And every such order sold or offered for sale by any agent, must be directed to the company, owners or consignees at their office.

&c., for the purpose of procuring tickets.

*Ibid.*, § 3.

§ 672. Every person guilty of a violation of any of the provisions of the preceding sections of this chapter, is punishable by imprisonment in a state prison not exceeding two years, or by imprisonment in a county jail not less than six months.

Punish-  
ment for  
violation  
of the pre-  
ceding  
sections.

*Ibid.*, § 4.

§ 673. All persons who conspire together to sell or attempt to sell, to any person, any passage ticket, or other instrument mentioned in sections 669 and 671, in violation of those sections, and all persons, who, by means of any such conspiracy obtain, or attempt to obtain any money or other property, under the pretense of procuring or securing any passage or right of passage in violation of this chapter, are punishable by imprisonment in a state prison not exceeding five years.

Conspiring  
to sell pas-  
sage tickets  
in violation  
of law.

*Ibid.*, § 5.

§ 674. Persons guilty of violating the last section, may be indicted and convicted for a conspiracy, notwithstanding the object of such conspiracy has been executed.

Conspi-  
rators may  
be indicted,  
notwith-  
standing  
object of  
conspiracy  
has been ac-  
complished.

*Ibid.*, § 6.

§ 675. All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this chapter, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this chapter, are punishable by imprison-

Office  
kept for  
unlawful  
sale of pas-  
sage tickets  
declared  
disorderly  
houses.

ment in a county jail for a period not exceeding six months, and not less than three months.

*Ibid.*, § 7.

Section 8 of the act is omitted for the reason that it is of doubtful expediency ; and if desirable to be retained, it appertains to the Code of Criminal Procedure. It is as follows: "All complaints regarding the violation of this act shall be presented by the district attorney of the district where such complaint was made, to the grand jury for indictment, in preference to all other complaints. And it shall be the duty of judges of the court of general sessions of the peace, and of the courts of oyer and terminer, in the counties of Erie, Albany and New York, to call the attention of the several grand juries to the provisions of this act."

Purser,  
station  
masters,  
conductors,  
&c., allow-  
ed to sell  
tickets.

§ 676. The provisions of this chapter do not prevent the actual owners or consignees of any vessel, from selling passage tickets thereon ; nor do they prevent the purser or clerk of any vessel or station master upon any railroad, or other ticket agent of any vessel or railroad, from selling in his office on board of such vessel, or in any station on such railroad, any passage tickets upon such vessel or railroad ; nor do they prevent any conductor upon any railroad from selling any passage tickets upon the trains of such railroad.

*Laws of 1860, ch. 103, § 9.*

Delay in  
departure  
of vessels.

§ 677. Whenever the departure of any vessel, for a passage on board of which, to a foreign port, any ticket or instrument above mentioned has been sold, is delayed more than two days after the day of sailing mentioned in such ticket, the person holding such ticket is entitled to his board and lodging in such vessel without any additional charge, from the second day after the day named for departure until the actual departure of such vessel ; and is also entitled to receive from the owners or consignees of such vessel fifty cents per day for each day of such detention. And in case of refusal on the part of the owners, consignees or master of the vessel so detained, to comply with this section, the person holding such

ticket is entitled to recover back from the owners or consignees the amount of passage paid by him, together with his damages for such detention, not exceeding fifty dollars.

*Ibid.*, § 10. This provision should perhaps be transferred to the Civil Code.

§ 678. Every ticket or instrument issued as evidence of a right of passage upon the high seas, from any port in this state, to any port of any other state or nation, and every certificate or order issued for the purpose, or under pretense of procuring any such ticket or instrument, and every receipt for money paid for any such ticket or instrument, must state the name of the vessel on board of which the passage is to be made, the name of the owners or consignees of such vessel, the name of the company, or line, if any, to which such vessel belongs, the place from which such passage is to commence, the place where such passage is to terminate, the day of the month and year upon which the voyage is to commence, the name of the person or persons purchasing such ticket or instrument, or receiving such order, certificate or receipt, and the amount paid therefor; and such ticket or instrument, order, certificate or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent.

What must  
be stated in  
passage  
ticket.

*Ibid.*, § 11.

§ 679. Every person who issues, sells or delivers to another, any ticket, instrument, certificate, order or receipt, which is not made or filled out as prescribed in the last section, is guilty of felony.

Sale of  
tickets not  
filled out as  
required in  
last section  
a felony.

*Ibid.*, § 11.

§ 680. No indictment or conviction under any provision of the preceding sections of this chapter, for the sale, attempted sale, issuing or delivering of any ticket, instrument, certificate, order or receipt, is defective because such ticket, instrument, certificate,

Requisites  
of indict-  
ment.

order or receipt is not made or filled out according to the requirements of the last section.

*Ibid.*, § 11.

Section 12 of the act, which defines the words "ship" and "steamship," is omitted. A definition of the word "vessel" is given, among other definitions of terms, in section 769.

"Company"  
defined.

§ 681. The term "company," as used in this chapter, includes all corporations, whether created under the laws of this state, or of those of any other state or nation.

*Laws of 1860, ch. 103, § 13.*

Foreign  
railroad  
companies.

§ 682. The provisions of this chapter do not permit railroad companies incorporated in any other state to sell passage tickets under this chapter in this state; nor do they permit the owners or agents of any vessel to sell tickets for or on behalf of any such railroad company.

*Ibid.*, § 14.

## CHAPTER XIV.

### FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.

SECTION 683. Issuing fictitious bills of lading, &c.

684. Issuing fictitious warehouse receipts.

685. Erroneous bills of lading or receipts, issued in good faith, excepted.

686. Duplicate receipts must be marked "Duplicate."

687. Selling, hypothecating or pledging property received for transportation or storage.

688. Bill of lading or receipt issued by warehouseman, must be canceled on redelivery of the property.

689. Property demanded by process of law.

Issuing  
fictitious  
bills of  
lading, &c.

§ 683. Every person being the master, owner or agent of any vessel, or officer or agent of any railroad, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel, or delivered to any

railroad, express or transportation company, or other carrier, unless the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment in a state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See *Laws of 1858*, ch. 326, § 5.

§ 684. Every person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading or other voucher for any merchandise of any description which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment in a state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

Issuing  
fictitious  
warehouse  
receipts.

See *Laws of 1858*, ch. 326, §§ 1, 2.

§ 685. No person can be convicted of an offense under the last two sections by reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the accused knew that such marks, labels or brands were untrue.

Erroneous  
bills of  
lading or  
receipts,  
issued in  
good faith,  
excepted.

§ 686. Every person mentioned in sections 683 and 684, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while any former receipt or voucher for the merchandise specified in such second receipt is outstand-

Duplicate  
receipts  
must be  
marked  
"Duplicate"

ing and uncancelled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment in a state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See *Laws of 1858*, ch. 326, § 3. The words "bill of lading" are not inserted in this section, as suggested by *Laws of 1859*, ch. 353, because by the settled commercial form of that instrument, a different mode of indicating that the parts of the bill are duplicates, is in use, and no advantage is anticipated from insisting on the word "duplicate."

Selling,  
hypothecat-  
ing or  
pledging  
property  
received  
for trans-  
portation  
or storage.

§ 687. Every person mentioned in sections 683 and 684, who sells, hypothecates or pledges any merchandise for which any bill of lading, receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment in a state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See *Laws of 1858*, ch. 326, § 4.

Bill of  
lading or  
receipt  
issued by  
warehouse-  
man, must  
be canceled  
on re-deliv-  
ery of the  
property.

§ 688. Every person, such as mentioned in section 684, who delivers to another any merchandise for which any bill of lading, receipt or voucher has been issued, unless such receipt or voucher bore upon its face the words "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment in a state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See *Laws of 1858*, ch. 326, § 6; *Laws of 1859*, ch. 353. The latter seems to have been intended to amend the former by adding the words "bill of lading" to the words "receipt or voucher," whenever they occur, and the word "forwarder" to the words "warehouseman, wharfinger, &c." The commissioners have inserted the words "bill of lading" in the sections in the text, wherever they are

appropriate; but to insert the word "forwarder" is thought unnecessary in the present form of the provision, and in some of the sections unsuitable.

§ 689. The last two sections do not apply where property is demanded by virtue of process of law.

Property  
demanded  
by process  
of law.

See *Laws of 1858*, ch. 326, § 8.

## CHAPTER XV.

### MALICIOUS INJURIES TO RAILROADS, HIGHWAYS, BRIDGES AND TELEGRAPHHS.

SECTION 690. Injuries to railroads.

691. Cases where death ensues.
692. Injuries to highways, private ways and bridges.
693. Injuries to toll houses and turnpike gates.
694. Injuries to mile boards and guide posts.
695. Injuring telegraph line, or intercepting message, a misdemeanor.

§ 690. Every person who maliciously either :

Injuries to  
railroads.

1. Removes, displaces, injures or destroys any part of any railroad, whether for steam or horse cars, or any track of any railroad, or any branch or branchway, switch, turnout, bridge, viaduct, culvert, embankment, station house, or other structure or fixture, or any part thereof, attached to or connected with any railroad ; or,
2. Places any obstruction upon the rails or track of any railroad, or of any branch, branchway or turnout connected with any railroad,

Is punishable by imprisonment in a state prison not exceeding four years, or in a county jail not less than six months.

See *2 Rev. Stat.*, 689, § 21.

§ 691. Whenever any offense specified in the last section results in the death of any human being, the offender is punishable by imprisonment in a state prison for not less than four years.

Cases  
where  
death  
ensues.

§ 692. Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or

Injuries to  
highways,  
private

**ways and bridges.** destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such way, is guilty of felony.

**Injuries to toll houses and turnpike gates.** § 693. Every person who maliciously injures or destroys any toll house or turnpike gate, is guilty of felony.

See 2 Rev. Stat., 695, § 30.

**Injuries to mile boards and guide posts.** § 694. Every person who removes or injures any mile board, mile stone or guide post, or any inscription on such, erected upon any highway, is guilty of a misdemeanor.

*Rep. Pol. Code, § 518.*

**Injuring telegraph line, or intercepting message, a misdemeanor.** § 695. Every person who maliciously takes down, removes, injures or obstructs any line of telegraph or any part thereof, or appurtenance or apparatus therewith connected, or severs any wire thereof, or fraudulently intercepts any message in its passage over such wire, is guilty of a misdemeanor.

## TITLE XVI.

### OF MALICIOUS MISCHIEF.

- SECTION 696.** Malicious mischief, in general, defined.  
 697. Specifications in following sections, not restrictive of last section.  
 698. Poisoning cattle.  
 699. Killing, maiming or torturing animals.  
 700. Instigating fights between animals.  
 701. Keeping houses, pits, &c., for fights between animals.  
 702. Wounding or trapping birds, or destroying birds' nests in cemeteries.  
 703. Burning buildings and other property not the subject of arson.  
 704. Breaking or injuring property in houses of worship.  
 705. Using gunpowder, &c., in destroying or injuring any building.  
 706. Endangering human life by placing gunpowder, &c., near building.  
 707. Malicious injuries to freeholds.  
 708. Injuries to standing crops, &c.  
 709. Removing, defacing or altering landmarks.

- SECTION** 710. Interfering with piers, dams, &c.  
 711. Destroying or injuring dams, &c.  
 712. Removing or injuring piles used in sea or river embankments, &c.  
 713. Removing any beacon in New York harbor.  
 714. Masking or removing signal lights.  
 715. Injuring or destroying written instruments.  
 716. Destroying or delaying election returns.  
 717. Opening or publishing sealed letters.  
 718. Disclosing contents of telegraphic dispatch.  
 719. Concealing telegraphic dispatch.  
 720. Injuring works of art or improvements in any city or village.  
 721. Destroying works of literature or art, or objects of curiosity in public libraries, museums, &c.  
 722. Breaking or obstructing gas or water pipes or appurtenances.

§ 696. Every person who, maliciously injures, defaces or destroys any real or personal property not his own, in cases other than such as are specified in the following sections, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property or public officer having charge thereof.

Malicious  
mischief,  
in general,  
defined.

See *Rev. Pol. Code*, 860.

§ 697. The specification of the acts enumerated in the following sections of this chapter, is not intended to restrict or qualify the interpretation of the last section.

Specifica-  
tions in  
following  
sections,  
not restric-  
tive of last  
section.

§ 698. Every person who willfully administers any poison to any animal, the property of another, and every person who maliciously exposes any poisonous substance with intent that the same shall be taken by any such animal, is punishable by imprisonment in a state prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.

Poisoning  
cattle.

2 *Rev. Stat.*, 689, § 16.

§ 699. Every person who maliciously kills, maims or wounds any animal, the property of another, or

Killing,  
maiming or  
torturing  
animals.

who maliciously and cruelly beats, tortures or injures any animal, whether belonging to himself or another, is guilty of a misdemeanor.

*2 Rev. Stat., 695 § 26.*

**Instigating  
fights be-  
tween ani-  
mals.**

§ 700. Every person who maliciously, or for any bet, stake or reward, instigates, encourages or promotes any fight between animals, or instigates or encourages any animal to attack, bite, wound or worry another, is guilty of a misdemeanor.

**Keeping  
houses,  
pits, &c.,  
for fights  
between  
animals.**

§ 701. Every person who keeps any house, pit or other place to be used in permitting any fight between animals, or in any other violation of the last section, is guilty of a misdemeanor.

**Wounding  
or trapping  
birds, or  
destroying  
birds' nests  
in ceme-  
teries.**

§ 702. Every person who, within any public cemetery or burying ground, wounds or traps any bird or destroys any bird's nest, or removes any eggs or young birds from any nest; and every person who buys or sells, or offers or keeps for sale, any bird which has been killed or trapped in violation of this section, is punishable by a fine of five dollars for each offense, recoverable by a civil action in any justices' court within the county where the offense is committed, brought in the name of any person making a complaint. Such fine shall be applied to the support of the poor of such county.

See *Laws of 1853*, ch. 629; *Laws of 1855*, ch. 564.

**Burning  
buildings  
and other  
property  
not the  
subject of  
arson.**

§ 703. Every person who willfully burns any building not the subject of arson, any stack of grain of any kind, or of hay, any growing or standing grain, grass, trees or fence, not the property of such person, is punishable by imprisonment in a state prison not exceeding four years and not less than one year, or by imprisonment in a county jail not exceeding one year.

This species of offense is by the existing law denominated arson in the fourth degree. *2 Rev. Stat., 667, §§ 7, 8.* The Commissioners have transferred it to this

chapter for the reasons specified in the note to section 521, applying to it the punishment prescribed for arson in the fourth degree by *Laws of 1862*, ch. 197, § 9.

**§ 704.** Every person who willfully breaks, defaces or otherwise injures any house of worship, or any part thereof, or any appurtenance thereto, or any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship, is guilty of felony.

Breaking  
or injuring  
property in  
houses of  
worship.

**§ 705.** Every person who maliciously, by the explosion of gunpowder or other explosive substance, destroys, throws down or injures the whole or any part of any building, by means of which the life or safety of any human being is endangered, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three.

Using gun-  
powder,  
etc., in de-  
stroying or  
injuring  
any build-  
ing.

See *Stat.*, 24th and 25th Vict., ch. 97, § 9.

**§ 706.** Every person who places in, upon, under, against or near to any building, any gunpowder or other explosive substance, with intent to destroy, throw down or injure the whole or any part thereof, under circumstances, that if such intent were accomplished, human life or safety would be endangered thereby, although no damage is done, is guilty of felony.

Endanger-  
ing human  
life by plac-  
ing gun-  
powder,  
etc., near  
building.

*Ibid.*, § 10.

**§ 707.** Every person who willfully commits any trespass, by, either :

Malicious  
injuries to  
freeholds.

1. Cutting down or destroying any kind of wood or timber, standing or growing upon the lands of another ; or,
2. Carrying away any kind of wood or timber that has been cut down, and is lying on such lands ; or,
3. Maliciously severing from the freehold any produce thereof, or anything attached thereto ; or,
4. Digging, taking or carrying away from any lot situated within the bounds of any incorporated city,

without the license of the owner, or legal occupant thereof, any earth, soil or stone, being a part of the freehold, or severed therefrom at some previous time, under such circumstances as would render the trespass a larceny, if the thing so severed or carried away were personal property ; or,

5. Digging, taking or carrying away from any land in any of the cities of the state, laid down on the map or plan of said city as a street or avenue, or otherwise established or recognized as a street or avenue, without the license of the mayor and common council or other governing body of such city, or of the owner of the fee thereof, any earth, soil or stone, under such circumstances as would render the trespass a larceny, if the thing so severed or carried away were personal property,

Is guilty of a misdemeanor.

Embraces such of the provisions of 2 Rev. Stat., 693, § 15, as amended *Laws of 1851*, ch. 182, as are not already covered by other sections of the Code.

**Injuries to standing crops, &c.**

§ 708. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this Code, or by some of the statutes which it specifies as continuing in force, is guilty of a misdemeanor.

See Stat., 24th and 25th Vict., ch. 97, §§ 23, 24.

**Removing, defacing or altering landmarks.**

§ 709. Every person who either :

1. Maliciously removes any monuments of stone, wood or other material, erected for the purpose of designating any point in the boundary of any lot or tract of land ; or,
2. Maliciously defaces or alters the marks upon any tree, post or other monument, made for the purpose of designating any point, course or line in any such boundary ; or,
3. Maliciously cuts down or removes any tree upon

which any such marks have been made for such purpose, with intent to destroy such marks,

Is guilty of a misdemeanor.

See 2 *Rev Stat.*, 695, § 32.

**§ 710.** Every person who, without authority of law, interferes with any pier, booms or dams, lawfully erected or maintained upon any waters within this state, or hoists any gate in or about said dams, is guilty of a misdemeanor.

Founded upon *Laws of 1859*, ch. 350, § 2, but made general. That act applies only to booms and dams in Salmon river.

**§ 711.** Every person who maliciously destroys any dam or structure erected to create hydraulic power, or any embankment necessary for the support thereof, or maliciously makes, or causes to be made, any aperture in such dam or embankment, with intent to destroy the same, is guilty of a misdemeanor.

2 *Rev. Stat.*, 695, § 31.

**§ 712.** Every person who maliciously draws up or removes, or cuts or otherwise injures, any piles fixed in the ground and used for securing any sea bank or sea walls, or the bank or dam of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbor, dock, quay, jetty or lock, is punishable by imprisonment in a state prison not exceeding five years and not less than two, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

See *Stat.*, 24th and 25th Vict., ch. 97, § 31.

**§ 713.** Every person who willfully removes any buoy or beacon placed in the harbor of New York by the United States light house board, or any other lawful authority, is guilty of a misdemeanor.

*Rep. Pol. Code*, § 381.

**§ 714.** Every person who unlawfully masks, alters or removes any light or signal, or willfully exhibits any

Interfering  
with piers,  
dams, &c.

Destroying  
or injuring  
dams, &c.

Removing  
or injuring  
piles used  
in sea or  
river em-  
bankments,  
&c.

Removing  
any beacon  
in New  
York har-  
bor.

Masking or  
removing  
signal lights

false light or signal, with intent to bring any vessel into danger, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three.

See *Stat.*, 24th and 25th Vict., ch. 97, § 47.

Injuring or  
destroying  
written  
instruments

§ 715. Every person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument being the property of another, the false making of which would be forgery, is punishable in the same manner as the forgery of such instrument is made punishable.

See *Nixon's Dig. Laws of N. J.*, 188, § 69.

Destroying  
or delaying  
election  
returns.

§ 716. Every messenger appointed by authority of law to receive and carry any report, certificate or certified copy of any statement relating to the result of any election, who willfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and every person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who willfully does any injury or other act such as is above specified, is punishable by imprisonment in a state prison not exceeding five years, and not less than two.

See *Laws of 1842*, ch. 130, tit. vi., § 18.

Opening or  
publishing  
sealed  
letters.

§ 717. Every person who willfully opens or reads, or causes to be read any sealed letter not addressed to himself, without being authorized so to do, either by the writer of such letter, or by the person to whom it is addressed; and every person who without the like authority publishes any letter, knowing it to have been opened in violation of this section or any part, is guilty of a misdemeanor.

Disclosing  
contents of  
telegraphic  
dispatch.

§ 718. Every person who discloses the contents of any telegraphic dispatch, or any part thereof, addressed to another person, without the permission of such person, to his loss, injury or disgrace, is guilty of a misdemeanor.

§ 719. Every person who, having in his possession any telegraphic dispatch addressed to another, maliciously secretes, conceals or suppresses the same, is guilty of a misdemeanor.

Concealing  
telegraphic  
dispatch.

§ 720. Every person who willfully injures, disfigures or destroys, not being the owner thereof, any monument, work of art, or useful or ornamental improvement, within the limits of any village, town or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground, or on any street, sidewalk or public park or place, is guilty of a misdemeanor.

Injuring,  
works of art  
or improve-  
ments in  
any city or  
village.

See *Laws of 1853*, ch. 573. *Laws of 1860*, ch. 98, § 3.

§ 721. Every person who maliciously cuts, tears, defaces, disfigures, soils, obliterates, breaks or destroys any book, map, chart, picture, engraving, statue, coin, model, apparatus, specimen or other work of literature or art, or object of curiosity deposited in any public library, gallery, museum, collection, fair or exhibition, is punishable by imprisonment in a state prison for not exceeding three years, or in a county jail not exceeding one year.

Destroying  
works of  
literature  
or art, or  
objects of  
curiosity in  
public libra-  
ries, muse-  
ums, &c.

§ 722. Every person who willfully breaks, digs up or obstructs, any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is punishable by imprisonment in a state prison not exceeding three years, or in a county jail not exceeding one year.

Breaking  
or obstruc-  
ting gas  
or water  
pipes or  
appurte-  
nances.

See *Laws of 1860*, ch. 172, § 7.

## TITLE XVII.

## OF MISCELLANEOUS CRIMES.

- SECTION** 723. Commissioner of excise granting license wrongfully.  
 724. Selling liquor to Indians.  
 725. Being intoxicated in public places.  
 726. Selling liquor to habitual drunkards.  
 727. Selling liquor to paupers.  
 728. Selling liquor upon Sundays.  
 729. Violation of laws relative to navigation.  
 730. Attorneys forbidden to defend criminal prosecutions carried on by their partners.  
 731. Public prosecutors forbidden to aid in defense of prosecutions, after leaving office.  
 732. Attorneys may defend themselves.  
 733. Intimidating laborers.  
 734. Intimidating employers.  
 735. Voting unlawfully at an annual town meeting.  
 736. Acts not expressly forbidden.

Commissioner of  
excise  
granting  
license  
wrongfully.

**§ 723.** Every commissioner of excise who concurs in granting any license to sell strong or spirituous liquors, or wines, contrary to the provisions of Chapter II of Title IV of Part III of the Political Code, is guilty of a misdemeanor.

See *Rep. Pol. Code*, § 792.

Selling  
liquor to  
Indians.

**§ 724.** Every person who sells or gives away any strong or spirituous liquor, or wine, to any Indian in this state, is guilty of a misdemeanor.

See *Rep. Pol. Code*, § 797

Being in-  
toxicated in  
public  
places.

**§ 725.** Every person being intoxicated in any public place, is punishable, upon conviction in the manner specified in § 799 of the Political Code, by a fine of ten dollars and costs of the proceedings at the same rate as in courts of special sessions, and by imprisonment in the county jail, workhouse or penitentiary until such fine is paid, not, however, exceeding ten days.

See *Rep. Pol. Code*, § 799.

**§ 726.** Every person guilty of selling any strong or spirituous liquor, or wine, to any person guilty of habitual drunkenness, or to any person to whom the seller has been requested by the parent, guardian, husband or wife of such person not to sell any strong or spirituous liquor, or wine, is punishable by a fine not exceeding fifty dollars and not less than twenty, for each offense; and in addition thereto he forfeits any license he may have received to sell strong or spirituous liquors, or wines, and is forever after incapable of receiving such license.

Selling li-  
quor to hab-  
itual drunk-  
ards.

*See Rep. Pol. Code, § 801.*

**§ 727.** Every person who sells or gives to any person, knowing him to be a pauper or inmate of any poorhouse or almshouse, any strong or spirituous liquor, or wine, without authority from the superintendent or physician of such poorhouse or almshouse, is punishable by a fine of twenty-five dollars.

Selling  
liquor to  
paupers.

*Rep. Pol. Code, § 802.*

**§ 728.** Every innkeeper, or person licensed to sell liquors, who sells or gives away any strong or spirituous liquor, or wine, upon Sunday, or upon any election day, in violation of section 803 of the Political Code, is guilty of a misdemeanor.

Selling  
liquor upon  
Sundays.

*See Rep. Pol. Code, § 803.*

**§ 729.** Every master or other person engaged in navigating any steamboat, who violates any of the provisions of sections 268, 269, 270, 271, 272, 273, 274, 275 or 282 of the Political Code, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, is liable to a penalty of two hundred and fifty dollars.

Violation of  
laws rela-  
tive to navi-  
gation.

*See Rep. Pol. Code, §§ 276, 283. Section 285 is not included in the above enumeration of sections, for the reason that its provisions are substantially embraced in other provisions of this Code.*

**§ 730.** Every attorney who directly or indirectly advises in relation to, or aids or promotes the defense

Attorneys  
forbidden  
to defend  
criminal

prosecutions carried on by their partners.

of any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor, with whom such person is directly or indirectly connected as a partner; or who takes or receives, directly or indirectly, from or on behalf of any defendant therein, any valuable consideration, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits his license to practice.

This section and the two next following are founded on the provisions of *Laws of 1846*, ch. 120. The verbal changes made are chiefly to secure greater conciseness of expression.

Public prosecutors forbidden to aid in defense of prosecutions after leaving office.

§ 731. Every attorney who, having prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise, or takes or receives any valuable consideration from or on behalf of any defendant therein, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, he forfeits his license to practice.

Attorneys may defend themselves.

§ 732. The two last sections do not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally.

Intimidating laborers.

§ 733. Every person who, by any use of force, threats or intimidation, prevents or endeavors to prevent any hired foreman, journeyman, apprentice, workman, laborer, servant or other person employed by another, from continuing or performing his work, or from accepting any new work or employment, or to induce such hired person to relinquish his work or

employment, or to return any work he has in hand, before it is finished, is guilty of a misdemeanor.

See *Stat.*, 6 *Geo. IV*, ch. 129, § 3. As to what constitutes a "threat," within such a provision, see *O'Neill v. Layman*, 11 *Weekly R.*, 947; 8 *Law T. (N. S.)*, 657. It is there held that under the English statute already cited, it is not necessary to show a threat of actual violence; but a threat to follow out an unlawful purpose is sufficient. Thus where L., being at the time in the employ of K., was summoned to attend a meeting of a club to which he belonged, and was asked by the chairman, "whether he intended to continue an honorable member of the club and leave K.'s employ, or remain where he was and be despised by the club, and have his name sent round all over the country, and be put to all sorts of unpleasantness;" it was held that this was a threat within the statute.

**§ 734.** Every person who, by any use of force, threats or intimidation, prevents or endeavors to prevent another from employing any person, or to compel another to employ any person, or to force or induce another to alter his mode of carrying on business, or to limit or increase the number of his hired foremen, journeymen, apprentices, workmen, laborers, servants or other persons employed by him, or their rate of wages or time of service, is guilty of a misdemeanor.

See *Stat.*, 6 *Geo. IV*, ch. 129, § 3.

**§ 735.** Every person who votes at any annual town meeting, in a town in which he does not reside, or who offers to vote at any annual town meeting after having voted at an annual town meeting held in another town, within the same year, is guilty of a misdemeanor.

Voting unlawfully at an annual town meeting.

Suggested as a substitute for *Rep. Pol. Code*, § 986. See note to section 68 of this Code, for reasons for change of phraseology.

**§ 736.** Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages

Acts not expressly forbidden.

public decency and is injurious to public morals, although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor.

*See Barb. Cr. L., 220, 222; Commonwealth v. Sharpless, 2 Serg. & R., 91; 1 Russ. Cr., 45; Bish. Cr. L., § 394*

## TITLE XVIII.

### GENERAL PROVISIONS.

**SECTION 737.** Acts made punishable by different provisions of this Code.

- 738. Acts punishable under foreign law.
- 739. Foreign conviction or acquittal.
- 740. Contempts, how punishable.
- 741. Mitigation of punishment in certain cases.
- 742. Aiding in misdemeanor.
- 743. Sending letter, when deemed complete.
- 744. Omission to perform duty, when punishable.
- 745. Attempts to commit crimes, when punishable.
- 746. Attempts to commit crimes, how punishable.
- 747. Restriction upon the preceding sections.
- 748. Second offenses, how punished, after conviction of former offense.
- 749. Attempts to conceal death of child, how punished after conviction of former attempt.
- 750. Second offenses, how punished, after conviction of petit larceny, or of attempt to commit a state prison offense.
- 751. Foreign conviction for former offense.
- 752. Second term of imprisonment, when to commence.
- 753. Imprisonment for life.
- 754. Sentence to state prison, how to be limited.
- 755. Juvenile offenders may be sent to penitentiary.
- 756. Fine may be added to imprisonment.
- 757. Civil rights of convict suspended.
- 758. Civil death.
- 759. Person of convict protected.
- 760. Forfeitures.
- 761. Witness' testimony may be read against him on prosecution for perjury.
- 762. Certain terms defined, in the senses in which they are used in this Code.
- 763. "Willfully" defined.
- 764. "Neglect," "negligence," &c., defined.
- 765. "Corruptly" defined.
- 766. "Malice" and "Maliciously" defined.
- 767. "Knowingly" defined.
- 768. "Bribe" defined.

- SECTION 769. "Vessel" defined.  
 770. "Peace officer" defined.  
 771. "Magistrato" defined.  
 772. "Signature" defined.  
 773. "Writing" defined.  
 774. "Real property" defined.  
 775. "Personal property" defined.  
 776. "Property" defined.  
 777. "Person" defined.  
 778. "Person," when used to denote owner of property.  
 779. Singular includes plural.  
 780. Masculine word includes feminine, &c.  
 781. Present tense, how used.  
 782. What intent to defraud is sufficient.  
 783. Civil remedies preserved.  
 784. Proceedings to impeach or remove officers and others, preserved.  
 785. Military punishments and punishments for contempt and certain special proceedings preserved.  
 786. Certain statutes specified as continuing in force.

§ 737. An act or omission which is made punishable in different ways by different provisions of this Code, may be punished under either of such provisions (except that in the cases specified in sections 748 to 751, inclusive, the punishments therein prescribed are substituted for those prescribed for a first offense), but in no case can it be punished under more than one; and an acquittal or conviction and sentence under either one, bars a prosecution for the same act or omission under any other.

Acts made  
punishable  
by different  
provisions  
of this Code

§ 738. An act or omission declared punishable by this Code, is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in this Code.

Acts pun-  
ishable un-  
der foreign  
law.

§ 739. But whenever it appears upon the trial of an indictment that the accused has already been acquitted or convicted upon any criminal prosecution under the laws of another state, government or country, founded upon the act or omission in respect to which he is upon trial, this is a sufficient defense.

Foreign  
conviction  
or acquittal.

This section is intended to apply in cases where the foreign acquittal or conviction took place in respect to

the particular *act or omission* charged against the accused upon the trial in this state, and is not restricted to cases where the accused was tried abroad under the same charge.

**Contempts,  
how pun-  
ishable.**

§ 740. A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt.

**Mitigation  
of punish-  
ment in cer-  
tain cases.**

§ 741. But where it is made to appear at the time of passing sentence upon a person convicted upon indictment, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

Founded upon 2 Rev. Stat., 278, § 15.

**Aiding in  
misdemeanor.**

§ 742. Whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the commission of such act is expressly prescribed by law, every person who counsels or aids another in the commission of such act, is guilty of a misdemeanor.

The punishment of accessories in cases of felony, is provided for by section 30 of this Code.

**Sending  
letter, when  
deemed  
complete.**

§ 743. In the various cases in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any post office or any other place, or delivered to any person with intent that it shall be forwarded. And the party may be indicted and tried in any county wherein such letter is so deposited or delivered, or in which it shall be received by the person to whom it is addressed.

See *Rex v. Williams*, 2 *Camp.*, 506.

**Omission  
to perform  
duty, when  
punish-  
able.**

§ 744. No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

§ 745. No person can be convicted of an attempt to commit a crime when it appears that the crime intended or attempted was perpetrated by such person in pursuance of such attempt.

Attempts  
to commit  
crimes,  
when pun-  
ishable.

*2 Rev. Stat., 702, § 26.*

§ 746. Every person who attempts to commit any crime, and in such attempt does any act towards the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

Attempts  
to commit  
crimes,  
when pun-  
ishable

1. If the offense so attempted be punishable by imprisonment in a state prison for four years or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in a state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction for the offense so attempted.

2. If the offense so attempted be punishable by imprisonment in a state prison for any time less than four years, the person guilty of such attempt is punishable by imprisonment in a county jail for not more than one year.

3. If the offense so attempted be punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. If the offense so attempted be punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment, and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

*2 Rev. Stat., 698, § 3.*

*Omitted provisions.* In the corresponding provision in the Revised Statutes the first subdivision is: "If the

offense so attempted to be committed was such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in a state prison not exceeding ten years." As arson is not punishable, according to the provisions of this Code, by death, there only remain attempts to commit murder and treason, to which this provision can possibly apply. Attempts to murder are the subject of specific provisions See sections 277, 278, 279. If there can be recognized an attempt to commit treason, which might be the subject of punishment under the above provision, such act will generally be found embraced under provisions of the Code relative to conspiracy, riot, &c. It has therefore not been thought important to retain the provision.

**Restriction  
upon the  
preceding  
sections.**

§ 747. The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

**Second of-  
fense, how  
punished,  
after con-  
viction of  
former  
offense.**

§ 748. Every person who, having been convicted of any offense punishable by imprisonment in a state prison, commits any crime after such conviction, is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction an offender would be punishable by imprisonment in a state prison for any term exceeding five years, such person is punishable by imprisonment in a state prison for a term not less than ten years.

2. If such subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in a state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in a state prison for a term not exceeding ten years.

3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in a state prison, then the person convicted of such

subsequent offense is punishable by imprisonment in a state prison for a term not exceeding five years.

Founded upon 2 *Rev. Stat.*, 699, § 8, the provision being extended to embrace cases of offenders who, upon a first conviction of a crime punishable in the discretion of the court by imprisonment in a state prison or otherwise, received sentence for the alternative punishment; instead of being confined to those who have been actually discharged from imprisonment upon the first conviction.

**§ 749.** Every woman who, having been convicted of endeavoring to conceal the birth of any issue of her body which, if born alive, would be a bastard, or the death of any such issue under the age of two years, subsequently to such conviction endeavors to conceal any such birth or death of issue of her body, is punishable by imprisonment in a state prison not exceeding five years, and not less than two.

Attempts  
to conceal  
death of  
child, how  
punished  
after con-  
viction of  
former at-  
tempt.

*Laws of 1845, ch. 260, § 4, modified as stated in note to preceding section.*

**§ 750.** Every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in a state prison, commits any crime after such conviction, is punishable as follows:

Second of-  
fenses, how  
punished,  
after con-  
viction of  
petit lar-  
ceny, or of  
attempt to  
commit a  
state prison  
offense.

1. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in a state prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life;

2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in a state prison for any term less than for life, such person is punishable by imprisonment in such prison for the longest term prescribed, upon a conviction for such first offense.

3. If such subsequent conviction is for petit larceny or for any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in a state prison, then such person is punishable by

imprisonment in such prison for a term not exceeding five years.

*2 Rev. Stat., 699, § 9, modified as stated in note to section 748.*

Foreign  
conviction  
for former  
offense.

§ 751. Every person who has been convicted in any other state, government or country of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in a state prison, is punishable for any subsequent crime committed within this state, in the manner prescribed in the last three sections, and to the same extent as if such first conviction had taken place in a court of this state.

*2 Rev. Stat., 700, § 10.*

Second  
term of im-  
prisonment,  
when to  
commence.

§ 752. When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.

*2 Rev. Stat., 700, § 11.*

Imprison-  
ment for  
life.

§ 753. Whenever any person is declared punishable for a crime by imprisonment in a state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years, not less than such as are prescribed. But no person can in any case be sentenced to imprisonment in a state prison for any term less than one year.

*2 Rev. Stat., 700, § 12, as amended by Laws of 1862, ch. 417. Section 12 is evidently the one intended to be amended by the act of 1862, though by a clerical error the reference made is to section 13.*

§ 754. In cases where convicts sentenced to be imprisoned in a state prison for a longer period than one year, it is the duty of the court before which the conviction is had to limit the time of the sentence so that it will expire between the month of March and the month of November, unless the exact period of the sentence is fixed by law.

Sentence to  
state pri-  
son, how to  
be limited.

*Laws of 1836*, ch. 171, § 6; "one year" being substituted for "two years," to correspond with the change introduced by *Laws of 1862*, ch. 417.

§ 755. Whenever any person under the age of twenty-one and above the age of sixteen years is convicted of an offense punishable by imprisonment in a state prison, in either of the judicial districts of this state within which is a penitentiary, the court before whom such conviction is had may, in its discretion, sentence the person so convicted to imprisonment in the penitentiary situated in that judicial district.

Juvenile  
offenders  
may be sent  
to peniten-  
tiary.

See *Laws of 1856*, ch. 158, § 1.

§ 756. Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed.

Fine may  
be added to  
imprison-  
ment.

2 Rev. Stat., 700, § 13

§ 757. A sentence of imprisonment in a state prison for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority or power during the term of such imprisonment.

Civil rights  
of convict  
suspended.

2 Rev. Stat., 700, § 19.

§ 758. A person sentenced to imprisonment in a state prison for life, is thereafter deemed civilly dead.

Civil death.

2 Rev. Stat., 700, § 20.

*Person of  
convict  
protected.*

§ 759. The person of a convict sentenced to imprisonment in a state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced.

*2 Rev. Stat., 700, § 21.*

*Forfeitures.*

§ 760. No conviction of any person for crime works any forfeiture of any property, except in the cases of an outlawry for treason, as provided by Title III of Part VI of the Code of Criminal Procedure, and other cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this state in the nature of a deodand, or where any person shall flee from justice, are abolished.

*See 2 Rev. Stat., 700, § 22. That no forfeiture is imposed for suicide, see section 228.*

*Witness'  
testimony  
may be read  
against him  
on prosecu-  
tion for  
perjury.*

§ 761. The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness shall not be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

*Certain  
terms de-  
fined, in the  
senses in  
which they  
are used in  
this Code.*

§ 762. Wherever the terms mentioned in the following sections are employed in this Code, they are deemed to be employed in the senses hereafter affixed to them, except where a different sense plainly appears.

*"willfully"  
defined.*

§ 763. The term "willfully," when applied to the intent which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

*"Neglect,"  
"Negli-  
gence,"  
&c., defined*

§ 764. The terms "neglect," "negligence," "negligent" and "negligently," when so employed, import a want of such attention to the nature or probable

consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

§ 765. The term "corruptly," when so employed, imports a wrongful design to acquire some pecuniary or other advantage to the person guilty of the act or omission referred to. "Corruptly" defined.

§ 766. The terms "malice" and "maliciously" when so employed, import a wish to vex, annoy or injure another person; established either by proof or presumption of law. "Malice" and "Maliciously" defined.

§ 767. The term "knowingly," when so applied, imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission. "Knowingly" defined.

§ 768. The term "bribe" signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion in any public or official capacity. "Bribe" defined.

§ 769. The word "vessel" when used with reference to shipping, includes ships of all kinds, steam-boats and steamships, canal boats, and every structure adapted to be navigated from place to place. "Vessel" defined.

§ 770. The term "peace officer" signifies any one of the officers mentioned in section 154 of the Code of Criminal Procedure. "Peace officer" defined.

§ 771. The term "magistrate" signifies any one of the officers mentioned in section 147 of the Code of Criminal Procedure. "Magistrate" defined.

§ 772. The term "signature" includes any name, mark or sign, written with intent to authenticate any instrument or writing. "Signature" defined.

**"Writing"**  
defined.

§ 773. The term "writing" includes printing.

**"Real property"**  
defined.

§ 774. The term "real property" includes every estate, interest and right in lands, tenements and hereditaments.

**"Personal property"**  
defined.

§ 775. The term "personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and written instruments by which any pecuniary obligation, right or title to property, real or personal, is created, acknowledged, transferred, increased, defeated, discharged or diminished.

**"Property"**  
defined.

§ 776. The term "property" includes both real and personal property.

See, as to the three sections above, 2 Rev. Stat., 702,  
§§ 33, 34.

**"Person"**  
defined.

§ 777. The word "person" includes corporations, as well as natural persons.

**"Person"**  
when used  
to denote  
owner of  
property.

§ 778. Where the term "person" is used in this Code to designate the party whose property may be the subject of any offense, it includes this state, any other state, government or country which may lawfully own any property within this state, and all public and private corporations, or joint associations, as well as individuals.

2 Rev. Stat., 703, § 35.

**Singular**  
includes  
plural.

§ 779. The singular number includes the plural, and the plural the singular.

**Masculine**  
word  
includes  
feminine,  
&c.

§ 780. Words used in the masculine gender, comprehend as well the feminine and neuter.

**Present**  
tense, how  
used.

§ 781. Words used in the present tense include the future, but exclude the past.

**What in-**  
**tent to**  
**defraud is**  
**sufficient.**

§ 782. Whenever, by any of the provisions of this Code chapter, an intent to defraud is required, in order to constitute any offense, it is sufficient if an

intent appears to defraud any person, association, or body politic or corporate whatever.

Suggested as a substitute for 2 *Rev. Stat.*, 703, § 36, which is as follows: Where any intent to injure, defraud or cheat is required by law to be shown in order to constitute any offense it shall be sufficient, if such intent be to injure, defraud or cheat the United States, this state or any other state or country, or the government or any public officer thereof, or any county, city or town, or any corporation, body politic or private individual.

The section in the text will also include the provision of 2 *Rev. Stat.*, 675, § 46, which is as follows: "Whenever by any of the foregoing provisions an intent to defraud is required to constitute forgery, it is sufficient if an intent appears to defraud the United States, any state, or territory, any body corporate, any county, city, town or village or any public officer in his official capacity, any copartnership or any one of such partners or any real person whatever." It may be doubted whether this language includes a joint stock association though doubtless intended so to do. And aside from this, the language is needlessly verbose.

§ 783. The omission to specify or affirm in this Code any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein does not affect any right to recover or enforce the same.

Civil remo-  
des pre-  
served.

§ 784. The omission to specify or affirm in this Code any ground of forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension.

Proceedings  
to impeach  
or remove  
officers,  
and others  
preserved.

§ 785. This Code does not affect any power con- Military  
ferred by law upon any court martial or other mili- punishments and  
punish-

ments for  
contempt  
and certain  
special pro-  
ceedings  
preserved.

Certain  
statutes  
spec-  
ified as con-  
tinuing in  
force.

tary authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officer, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants.

§ 786. Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by any subsequent laws.

1. All acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporations, or providing for the election or appointment of officers therein, or defining the powers and duties of such officers.

2. All acts relating to emigrants or other passengers in vessels coming from foreign countries.

3. An act concerning foreign bank notes. Passed May, 1839.

*Laws of 1839, ch. 355.*

4. An act to amend the act entitled "an act to authorize the business of banking." Passed May 14, 1840.

*Laws of 1840, ch. 363.*

5. An act to amend the act entitled "an act to amend the act entitled an act to authorize the business of banking;" passed May 14, 1840. Passed April 10, 1850.

*Laws of 1850, ch. 251.*

6. An act requiring the police justices in the city of New York to file records of all convictions of vagrancy. Passed April 12, 1853.

*Laws of 1853, ch. 183.*

7. An act to provide for the care and instruction of idle and truant children. Passed April 12, 1853.

*Laws of 1853, ch. 185.*

8. An act to amend an act entitled "an act concerning foreign bank notes." Passed April 13, 1853.

*Laws of 1853, ch. 223.*

9. An act in relation to the property and money taken from persons arrested and accused of crimes in the city of New York and Brooklyn. Passed April 9, 1855.

*Laws of 1855, ch. 199.*

10. An act to regulate the business of purchasing rags, rope and metals in the city of Albany. Passed March 28, 1857.

*Laws of 1857, ch. 193.*

11. An act to establish a metropolitan police district and provide for the government thereof. Passed April 15, 1857.

*Laws of 1857, ch. 569*

12. An act to provide for the preservation of timber and stone on the lands of Onondaga Indian Reservation. Passed April 16, 1857.

*Laws of 1857, ch. 659.*

13. An act to establish regulations for the port of New York. Passed April 16, 1857.

*Laws of 1857, ch. 671.*

14. An act in relation to jurors and to the appointment and the duties of a commissioner of jurors in the county of Kings. Passed April 17, 1858.

*Laws of 1858, ch. 322.*

15. An act to provide for the organization and government of the police force of the city of Albany. Passed March 31, 1859.

*Laws of 1859, ch. 82.*

16. An act to amend an act entitled "an act for the regulation and government of the central park in the city of New York;" passed April 17, 1857, and further to provide for the maintenance and government of said park. Passed April 15, 1859.

*Laws of 1859, ch. 349.*

17. An act in relation to the court of special sessions in the city and county of New York, and the powers of police justices. Passed April 19, 1859.

*Laws of 1859, ch. 491.*

18. An act to amend an act entitled "an act to establish a metropolitan police district, and to provide for the government thereof;" passed April 15, 1857. Passed April 10, 1860.

*Laws of 1860, ch. 259.*

19. An act to lay out a public park and a parade ground for the city of Brooklyn, and to alter the commissioner's map of said city. Passed April 17, 1860.

*Laws of 1860, ch. 488.*

20. An act to preserve the public peace and order on the first day of the week, commonly called Sunday. Passed April 17, 1860.

*Laws of 1860, ch. 501.*

21. An act to amend an act entitled "an act to lay out a public park and a parade ground in the city of Brooklyn, and to alter the commissioner's map of said city;" passed April 17, 1860. Passed May 2, 1861.

*Laws of 1861, ch. 340.*

22. An act to regulate places of public amusement in the cities and incorporated villages of this state. Passed April 17, 1862.

*Laws of 1862, ch. 281.*

23. An act for the preservation of moose, wild deer, birds and fresh water fish. Passed April 23, 1862.

*Laws of 1862, ch. 474.*

It will be observed that no statutes whatever, are repealed by this Code, as proposed. The various provisions of our statute law declaring crimes or imposing criminal punishments, are in numerous instances so interwoven with provisions relative to civil rights and remedies, that a repealing act which should exhibit the proposed changes

in the law in the form of designating the acts or parts of acts *repealed*, would be almost impracticable. A mere provision in general terms that all inconsistent provisions should be deemed repealed, leaves the whole effect and operation of the Code open to judicial construction. The particular operation of the Code, upon the existing statutes, might doubtless be exhibited in detail, by a chapter enumerating acts or parts of acts which are repealed, in full, and *amending* sections of existing statutes which contain provisions relative to criminal law, combined with others. The great difficulty of doing this without disturbing civil rights founded upon the existing statutes, and the amount of space required in the printed Code, for such a chapter, are the objections to this method. The Commissioners have, therefore, made no provision in the Penal Code for *repeal* of any laws now in force. They have provided by section 2, that, from the time when the Code takes effect, no person shall be punished criminally, except as provided by this Code, or by some of the statutes which it specifies as continuing in force. In the section in the text they enumerate the statutes which are intended to be continued. The effect is that while other statutes will remain unrepealed, and in full effect, so far as past transactions or civil rights or remedies are concerned, courts of criminal jurisdiction will be forbidden to enforce them, in so far as before the adoption of the Code they authorized criminal punishments.

The acts enumerated in the above section are for the most part either local or special in their character, and proper to be continued as separate laws, rather than to be incorporated in either of the proposed Codes, or acts which have been passed since the other Codes now before the legislature were reported but which relate to subjects embraced within the scope of some one of the Codes, and the valuable provisions of which should be incorporated with the Code to which they belong wherever it is finally reviewed by the legislature. In addition to the above mentioned statutes there are laws relative to special subjects, which it is designed to retain in a separate form and which will contain some provisions of a penal nature but not of general interest or application. These are the Health Laws, the School Laws, the Poor Laws, the Fiscal Laws, the Laws relative to the Inspection of Merchandise, &c., and those relative to Prisons and Prison Discipline.

It should be added that this draft has been prepared, and the printing commenced, too early to allow any of the acts of the session of 1864 to be examined with reference to incorporating their provisions in it.







